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ABSTRACT

This third chapter of "The Yearbook of School Law, 1986" summarizes and analyzes state and federal court decisions handed down in 1985 affecting the legal rights of students in elementary and secondary schools. Among the topics examined are public school pupil assignment, tuition, transportation, compulsory attendance, and bilingual and bicultural programs; the public provision of services to students in private or parochial schools; student participation in athletics and other activities; students' civil rights and civil liberties; sanctions for misconduct; student testing and placement; and the desegregation of schools. The chapter notes that first amendment religion cases assumed increasing importance during the year, that school search cases were heard by several state and federal courts, and that, following a recent trend, local districts continue to claim that desegregation standards mandated by court order have been met. Litigation concerning students with disabilities is covered in a separate chapter of the yearbook. (PGD)

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Henry S. Lufler, Jr.

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INTRODUCTION

First amendment religion cases assumed increasing importance in 1985. The United States Supreme Court decided two cases regarding the offering of publicly funded programs in private schools and addressed the question of a moment of silence at the start of the school day. Courts also wrestled with the question of the use of school facilities, both by religious groups and those conveying a political message. In addition, a large number of cases addressed claims that parents have the right to educate their children at home, either for religious

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reasons or based on other arguments. As a consequence, the compulsory attendance section of this chapter grew significantly.

The Supreme Court, as well as a number of state courts, heard cases in 1985 involving school searches. The grounds under which such searches might be conducted were argued, with courts continuing to find that most school searches did not violate the fourth amendment. A new balancing test for weighing the legality of searches was set forth by the Supreme Court.

Finally, school desegregation cases continued the trend seen in recent years by focusing on claims that districts had achieved unitary status. Court supervision is removed once a district has attained an order holding that desegregation has been achieved. This gives the district greater latitude to manage internal affairs and requires a new showing of discriminatory intent if court review of decisions affecting minority students is to be secured. A major issue involving the point in time from which attorney fees can be charged in desegregation cases also was addressed in several jurisdictions.

PUBLIC SCHOOL ASSIGNMENT, TUITION, AND TRANSPORTATION

Tuition and Assignment

Pupil assignment cases range from those involving the exclusion of whole groups of children from the public schools to those minor disputes in which a child lives in a home astride a district line. The United States Supreme Court has, in recent years, addressed a number of constitutional issues associated with residency requirements. The Court has affirmed the rights of states and school districts to have such requirements and to prohibit parents from sending their children to schools outside their own geographic districts under *de facto* guardianships.[1] At the same time, residence requirements cannot exclude classes of children otherwise residing in the district, such as undocumented aliens.[2] Residence statutes also cannot create an irrebuttable presumption of nonresidence, thereby affording an individual no opportunity to prove domicile for the purpose of receiving educational benefits.[3]

A number of these constitutional issues were found in a 1985

1. Martinez v. Bynum, 461 U.S. 321 (1983).
2. Plyler v. Doe, 457 U.S. 202 (1982).
3. Vlandis v. Kline, 412 U.S. 441 (1973).

Eighth Circuit case.[4] The plaintiffs in the case were minors who did not have a parent or legal guardian living in the school district that had excluded them. The two children were living with an aunt and an uncle; their natural father was, according to the proceedings, an unfit parent and the mother, while not wishing to have the children with her, refused to consent to a transfer of legal guardianship. The district court had held that the school district's action comported with Arkansas statutes requiring either a parent or guardian to live in the district.[5]

In confronting this set of facts, the Eighth Circuit Court concluded that the district's action had created a class of children who were in the district for reasons other than to obtain an education who did not meet the residency requirement. The court could not find a substantial state interest for the district's discrimination against this class, thereby holding that it violated the equal protection clause. The court also found that the *Vlandis v. Kline* requirement against irrebuttable presumptions had been violated because there was no way the plaintiffs could demonstrate they resided in the district for educational purposes. Therefore, the due process clause also had been violated.

The appeals court ordered the children admitted to school, suggesting that school districts address residency questions by focusing on a student's present intent to remain in the school district. The court therefore rejected the statute's overly narrow test of focusing only on parents and guardians as a means of determining residence for educational purposes. The case was remanded for a determination of damages for the constitutional violation.

Equal protection arguments also were raised in a case challenging an Atlanta, Georgia policy of requiring tuition payments from some classes of aliens attending public schools.[6] Under the policy, never formally adopted by the board of education, children under some, but not all, visa categories were required to pay tuition. Apparently directed at children of aliens of Iranian citizenship attending Georgia universities, the policy was implemented by the district's budget manager and was later rescinded, though the district refused to return tuition payments made by the plaintiffs. The plaintiffs sought a summary judgment for the tuition refund as well as damages.

The court had little trouble in sustaining the plaintiff's request for a summary judgment on equal protection grounds. The disputed

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4. Horton v. Marshall Pub. Schools, 769 F.2d 1323 (8th Cir. 1985).
5. Horton v. Marshall Pub. Schools, 589 F. Supp. 95 (W.D. Ark. 1984).
6. Pena v. Board of Educ. of City of Atlanta, 620 F. Supp. 293 (N.D. Ga. 1985).

policy applied only to some classes of visa holders and, further, did not apply to the offspring of students from other states attending institutions of higher education in Georgia. While the defending school system sought to argue that the policy had not been adopted by the board, thereby avoiding the damage issue, the court observed that board members had been informed of the policy at a meeting and had not objected. Furthermore, the court held a district "should not be permitted to insulate itself from section 1983 liability merely by authorizing its agents to develop programs, being 'informed' of them, and then silently acquiescing in their implementation."[7] The parties were given thirty days to prepare briefs on the damage question.

A White Plains, New York student sought summary judgment on the issue of damages arising from his exclusion from school.[8] The case hinged on the failure of the district to provide written notice as to the reasons why the defendant was denied residence, even after several requests made by the plaintiff's attorney recorded after an appeal deadline had passed and the plaintiff had finally secured counsel. Following a discussion of the seriousness of the district's decision, the court concluded that the plaintiff, at that point unrepresented, would have no way of knowing that the school board's decision could be appealed to the state superintendent. Having concluded that written notice of the findings and the appeal procedures were required, the court held that the board and state superintendent were liable for "nominal" damages for the denial of the plaintiff's due process rights.

The question of estoppel was successfully raised in a case heard by the Oklahoma Supreme Court.[9] The plaintiff had purchased a home in 1975, relying on telephone calls made to two school districts that the property in question was located in the Mid-Del district. After sending their children to Mid-Del schools for five years, District 89, the adjoining district, concluded they had erred five years earlier and that the children should be attending their schools. The parents sued to keep their children in the district where they had been attending. While observing that estoppel was not normally invoked against the state, as it would preclude officials from enforcing lawful policies, the Oklahoma court allowed its use in this case, holding that the children had attained *de facto* residence in the district they had attended for five years.

Parents often dispute school district residence decisions on the

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7. *Id.* at 302.
8. Takeall v. Ambach, 609 F. Supp. 81 (S.D.N.Y. 1985).
9. Burdick v. Independent School Dist. of Okla. County, 702 P.2d 48 (Okla. 1985).

ground that a higher-quality education can be obtained for their children at their preferred school. These cases generally fail to succeed. A statute in the state of Washington, however, permits the superintendent to approve such a transfer if a "special hardship or detrimental condition" is alleviated as a result. The parents of two children failed to convince the superintendent that such an exception should be granted for their offspring and a suit commenced, finally reaching the Supreme Court of Washington.[10] The system the children were to attend had fifty students, and when the students previously were enrolled in it they had done poorly. The children had attended an adjacent district for a year and the children had, the parents argued, showed educational gains. The court refused, however, to overturn the superintendent's decision, and overrode a lower-court decision which had reversed it, holding that disparities among school districts were not, alone, enough to conclude that the children could not make educational gains in the district where they resided. To rule otherwise, the court observed, would reduce the state to a single school district.

In a decision handed down a month later, a Washington appeals court reversed the superintendent's decision in another "hardship" case.[11] In this instance, a variety of factors were related to the court's conclusion regarding the transfer. The transfer had been approved locally, but a change in local administrators led to a revocation of the permission, in spite of the fact that the student would then be obligated to travel an additional hour and a half each day on a school bus. Failure to grant the transfer, it was argued, also would affect the mother's health and would lead to other family problems. Accepting these reasons, the court overturned the superintendent's decision, holding it to be erroneous, given the facts of the case.

A New York parent also sought to change his daughter's school district, arguing that state law permitting such transfers only for handicapped, gifted, or behaviorally problematic students was arbitrary and capricious.[12] In a brief decision, an appeals court held that the district's decision was reasonable and that it was rationally related to the goal of preventing overcrowding and the maximum utilization of educational facilities.

Some states have laws permitting students to attend school tuition free if their parents move out of a district just before or during the student's senior year. An Ohio student in his junior year sought to expand this concept and finish school in the same institution by

10. Ramsdell v. North River School Dist., 704 P.2d 606 (Wash. 1985).
11. Pat v. Stanwood School Dist., 705 P.2d 1236 (Wash. Ct. App. 1985).
12. Britt v. Rogers, 485 N.Y.S.2d 358 (N.Y. App. Div. 1985).

claiming that his grandfather was his legal guardian. Absent any showing of legal custody, an appeals court rejected the attempt.[13]

In an unusual case, a local district sought to continue to send some of its students to an adjoining district, over the objections of parents and a ruling by the state education department.[14] It was less expensive for the Wayne Highland School District in Pennsylvania to pay for the students to be educated across the state line in New York. The state appeals court decision, however, made it clear that assignment to another district was possible only with parental approval.

Finally, in a 1985 fee case, the Attorney General of Michigan filed suit against two school districts, alleging that their imposition of a fee for students participating in interscholastic athletics violated the state constitution.[15] Courts traditionally uphold fees for school activities that are not part of the school's academic program. In the case at hand, an appeals court rejected the state constitutional challenge, noting that participation in sports was voluntary and extracurricular in nature. The court also observed that there was a confidential process, available to students unable to pay, whereby the fee could be waived.

Transportation

The cost of transporting students living in isolated areas of large rural school districts sometimes leads to litigation to determine who is responsible for the charge, or to demands for transportation when a district refuses to provide it. In 1980, the West Virginia Supreme Court of Appeals held that the condition of a rural road could not be used by a district as grounds to refuse to provide transportation.[16] In that case, the court determined that the district would have to purchase a vehicle other than a traditional school bus in order to avoid denying the equal protection rights of the students. A case before the West Virginia high court in 1985 extended the coverage of its 1980 decision.[17] Two handicapped children who resided on a privately owned road had been denied transportation. The court ruled, however,

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13. State *ex rel.* Henry v. Board of Educ., Madison Plains Local Schools, 485 N.E.2d 732 (Ohio Ct. App. 1984).

14. Wayne Highlands School Dist. v. Pennsylvania Dep't of Educ., 488 A.2d 1172 (Pa. Commw. Ct. 1985).

15. Attorney General v. East Jackson Pub. Schools, 372 N.W.2d 638 (Mich. Ct. App. 1985).

16. Shrewsbury v. Board of Educ., 265 S.E.2d 767 (W. Va. 1985).

17. Kennedy v. Board of Educ., McDowell County, 337 S.E.2d 905 (W. Va. 1985).

that the state law did not distinguish between public and private roads and therefore the district had an obligation to provide the service. In an earlier West Virginia case, the same court ordered a school district to provide bus service to two families living beyond current bus routes and to consider reorganizing the routes to prevent rides in excess of an hour.[18]

An Arizona transportation case involved interpretation of state laws governing the responsibility for busing costs in school districts that do not operate high schools.[19] The Vail School District had no high school and paid transportation costs to send some of its students to one of several adjacent districts that operates a secondary school. Some students, however, attended a different high school located closer to their homes, under a state law that gives parents the right to select a school of their choice when they live in a district without a high school. At issue, then, was the question of whether the Vail District, once it paid transportation costs for some students, was obligated to pay the bill for all students residing within the district. The appeals court concluded that state statutes created no such obligation. The court reasoned that it would be economically impossible to pay districts to transport a single student over long distances, the "logical conclusion" of the appellant's position.

A North Dakota parent who agreed to pay for transportation under a statute authorizing a district to charge for transportation services later filed suit challenging the constitutionality of the statute. The father had paid one-third of the sum he contracted to pay. The North Dakota Supreme Court declined to hear the constitutional challenge, however, holding that a litigant cannot seek to enjoy benefits by challenging the constitutionality of the law once having entered into the contract.[20]

Compulsory Attendance

Compulsory attendance cases have grown in number in recent years as more and more parents seek to educate their children at home or in fundamentalist Christian schools. Litigation results when parents or schools fail to comply with state statutes regulating curriculum and the credentials of teachers or with definitions of what constitutes a school. At the same time, states without a statutory defini-

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18. Sigmon v. Board of Educ., Roane County, 324 S.E.2d 352 (W. Va. 1984).
19. Flowing Wells School Dist. v. Vail School Dist., 700 P.2d 1378 (Ariz. Ct. App. 1985).
20. Bismarck Pub. Schools v. Walker, 370 N.W.2d 565 (N.D. 1985).

tion of a school, or with vague requirements regarding curriculum, have found themselves without an effective compulsory attendance law after court rulings that overly broad or vague statutes violated the fourteenth amendment. A number of attendance statutes fell as a result of such challenges in 1985.

In a case that the United States Supreme Court refused to review,[21] the Iowa Supreme Court ruled that the Calvary Baptist Christian Academy was required to comply with state private school reporting requirements and that the "Amish exception" to state compulsory attendance laws was not improperly denied them by the state board of public instruction.[22] The school's pastor had argued that the selection of the school's teachers "is made by God" and that the state therefore could not require state certification or licensing. Likewise, the school's curriculum was "set by God alone" and could not be reported to the state.[23]

The Iowa court rejected these arguments, observing that educational credentials and religious beliefs were not necessarily mutually exclusive. The church school officials were free to select teachers based on their religious beliefs, so long as they also were qualified as teachers. The court also held that the state can set basic educational requirements and gather data to see if they are met. On the question of the "Amish exemption," the court found the beliefs of the plaintiffs to be "greatly less interwoven with their daily mode of life" than those of the Amish and refused to sustain the plaintiff's equal protection argument that they should be treated the same. The Iowa requirement of "equivalent instruction" at private schools, a term argued in other 1985 attendance cases, was not raised in this appeal.[23]

The failure of Iowa state law to define "equivalent instruction" was, however, at issue in a federal court case.[24] In addition, as in the state case just discussed, the plaintiffs objected to reporting basic data about students, the names of teachers, and the course of study pursued by each child. The school also refused to use certified teachers. The argument that these regulations violated the religious freedom of church members was rejected by the court, which held that the state interest in guaranteeing the education of children overrode the small intrusion these requirements represented into the plaintiff's first amendment rights.

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21. Pruessner v. Benton, 54 U.S.L.W. 3401 (1985).

22. Johnson v. Charles City Community Schools Bd., 368 N.W.2d 74 (Iowa 1985).

23. *Id.* at 78.

24. Fellowship Baptist Church v. Benton, 620 F. Supp. 308 (D. Iowa 1985).

The Iowa requirement of "equivalent education," however, was struck down as being unconstitutionally vague, thereby violating the due process clause of the fourteenth amendment. The Iowa state superintendent had argued that the requirement referred to days of instruction and a list of required courses. Local school officials, on the other hand, had interpreted the term to require them to check the actual content of courses. In view of the lack of state court decisions to help interpret the legislature's intent with regard to the term, the district court held that it was overly vague. The court also held the plaintiffs responsible for the costs of the case.

Minnesota law requires teachers at private schools to have qualifications "essentially equivalent" to those of public school teachers offering the same subjects or teaching the same grades. The mother of two children formed the "Newstrom Family School" to educate her children at home and subsequently was convicted of violating Minnesota's compulsory attendance statute. The state argued that the mother's two years of college training was not equivalent, under the statute, while the parent had sought unsuccessfully to have evidence regarding her teaching skills and her children's performance considered by a lower court.

In considering the case, the Minnesota high court observed that trial judges in the state had difficulty in interpreting the statutory language and that it had been read differently in varying locations.[25] The court therefore concluded, after a discussion that spoke approvingly of standards for private-school students, that the language was too vague to form the basis for a criminal truancy prosecution. The court went on to suggest, however, that a civil proceeding initiated by a local school superintendent would place the burden on a private school to prove that the instructor had qualifications that were "essentially equivalent." In a companion case, the Minnesota court also affirmed a lower-court reversal of an attendance-law conviction, for the same reasons as in the previous case.[26]

Two Missouri families established an organization known as Families for Home Education and sought to educate their children at home to avoid exposing them to values in the public schools which they felt violated their personal religious convictions. They challenged the Missouri compulsory attendance statute which requires that home instruction "shall, in the judgment of a court of competent jurisdiction, be at least substantially equivalent to the instruction given children in the day schools in the locality in which the child resides."[27]

25. State v. Newstrom, 371 N.W.2d 525 (Minn. 1985).
26. State v. Budke, 371 N.W.2d 533 (Minn. 1985).
27. Mo. Rev. Stat. § 167.031 (1978).

The plaintiffs argued that the term "substantially equivalent" rendered that portion of the statute unconstitutional because it violated their substantive due process rights. A district court agreed, finding that neither the state education department nor state courts had ever attempted to define its meaning.[28] The court stayed its order until May 1986, in order to allow the legislature to reword the home instruction portion of the statute. Failure to act would leave the state without a provision for home instruction, causing parents of children educated at home to be subjected to truancy charges.

A Massachusetts district court rendered a decision on a number of motions related to a case involving two Christian academies.[29] As is often the case in attendance disputes, this controversy began with a squabble between public and private school administrators. In this instance, the public school administrator eventually sought to approve the private school curriculum. While dismissing some of the motions and accepting others, the court refused to render a summary judgment that the state statute requiring private school instruction to be equal "in thoroughness and efficiency" to that of the public schools was overly broad. The case will now be argued on the remaining issues.

The question of home instruction in North Carolina has been litigated on several occasions, but, in the absence of a home instruction provision in the state statutes, courts have been reluctant to permit home instruction under "private school" definitions.[30] The issue again was considered by the Supreme Court of North Carolina in a case involving the "Hallelujah School" which parents had started to educate their two children at home.[31] The parents espoused a series of social and religious views, including their belief that sending children to school at an early age signifies to the children their parents' rejection of them. A state official refused to certify the school, and litigation commenced.

The North Carolina court concluded that the school had complied with private school statutory regulations: the maintenance of student records, health and safety inspections, administration of standardized tests, and the provision of other information to state officials. The court concluded, therefore, that home instruction meeting these requirements met the legislative intent regarding what constituted a

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28. Ellis v. O'Hara, 612 F. Supp. 379 (E.D. Mo. 1985).

29. Braintree Baptist Temple v. Holbrook Pub. Schools, 616 F. Supp 81 (D. Mass. 1985).

30. Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983); Delconte v. State, 308 S.E.2d 898 (N.C. Ct. App. 1983). *See* The Yearbook of School Law 1984 at 140.

31. Delconte v. State, 329 S.E.2d 636 (N.C. 1985).

school. The fact that the state had recently eliminated private school requirements with respect to curriculum and teacher credentials was cited by the court as evidence that the state was loosening standards regarding nonpublic education in North Carolina. The North Carolina legislature was invited, if it wished, to address further the question of home instruction through changes in the law.

Florida statutes define a school as "an organization of pupils for instructional purposes on an elementary, secondary, or other public school level . . . ."[32] Parents who were educating their children at home had sought to claim their residence as a private school, in part to avoid the home instruction Florida statute which permits such instruction only by a "private tutor" meeting certain requirements. A Florida appeals court, however, refused to find that the state school definition was unconstitutionally vague, and upheld the parents' conviction for violating compulsory attendance laws.[33] A lengthy dissent filed by one judge argued that the definition was overly vague, citing a number of the cases already reviewed in this section to support his contention.

Protracted litigation involving Indiana's compulsory schooling law continued in 1985. A federal district court had stayed proceedings in the case, three years after it had first been filed, inviting the plaintiffs to bring the case in state court. The plaintiffs appealed the stay, and the Seventh Circuit Court of Appeals first ruled that a stay order was appealable.[34] On the actual appeal, the circuit court offered the opinion in *dicta* that the "equivalent instruction" requirement in Indiana law was not overly vague and remanded the case to the district court to rule on the numerous issues in the case, holding that further delay was not warranted.[35] The district court refused to decide the constitutionality of the state statute, concluding instead that the plaintiff's testimony had proved that their children had received equivalent instruction in their home program.[36] The plaintiffs in the case also asked for damages and injunctive relief, claiming they had been harassed by various state and local officials. These requests were denied.

In a case of a different sort, parents who claimed they were in

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32. Fla. Stat. § 228.041(5) (1984).

33. Florida v. Buckner, 472 So. 2d 1228 (Fla. Dist. Ct. App. 1985).

34. Mazanec v. North Judson-San Pierre School Corp., 750 F.2d 625 (7th Cir. 1984).

35. Mazanec v. North Judson-San Pierre School Corp., 763 F.2d 845 (7th Cir. 1985).

36. Mazanec v. North Judson-San Pierre School Corp., 614 F. Supp 1152 (N.D. Ind. 1985).

danger of being prosecuted under North Carolina's compulsory attendance law filed suit attacking their school district's plan to lengthen the school day and to change the school year from 180 days to 200 days.[37] The changes were being made under an experimental, state-funded program to improve student learning. The state appeals court concluded that state law did not preclude increased school days and additional instruction beyond the minimum required, finding that parents should be "blessed with the opportunity," rather than feeling burdened. The court also held that there was no evidence that parents were in danger of being prosecuted under the state's compulsory attendance law.

Compulsory attendance cases sometimes involve simultaneous state court and federal court litigation. In one such case, Texas parents charged in a state court proceeding for failing to send their children to school brought suit in federal court alleging the prosecution was in retaliation for exercising their first amendment religious rights. The state action, in the meantime, had been dismissed and a second prosecution had been started. The parents then argued that they had been told that their refusal to change their federal complaints regarding the first state prosecution would lead to their second arrest. To resolve this confusion, the Fifth Circuit Court of Appeals sustained a lower court ruling that held there was conflicting evidence on the role of the prosecutor in the decision to initiate the second case.[38] The appeals court held that the case in state court should continue and that the constitutionality of the Texas school definition should be decided there.

In another case alleging harassment, Maine officials were alleged to have conspired to deny the constitutional rights of parents seeking to educate their children at home. Following the 1983 decision by Maine's Supreme Judicial Court which held that the parents did not have such a right,[39] the parents went to federal court seeking the removal of the justices who had voted against them and other damages as well. The *pro se* complaint included the plaintiff's own lawyer in the state case, who was alleged to be a "coconspirator" with state officials. In a sharply worded decision, the federal court dismissed the complaint as having no legal foundation, holding open only that portion involving the plaintiff's former attorney, who had asked for dam-

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37. Morgan v. Polk County Board of Educ., 328 S.E.2d 320 (N.C. Ct. App. 1985).

38. Trower v. Maple, 774 F.2d 673 (5th Cir. 1985).

39. Maine v. McDonough, 468 A.2d 977 (Me. 1983). *See* The Yearbook of School Law 1985 at 95-6.

ages and fees as part of his response to the complaint.[40]

The use of contempt proceedings to force juveniles to attend school has been employed in a number of jurisdictions in recent years. Failure to attend results in incarceration in a juvenile detention facility. A Wisconsin appeals court considered a case challenging the contempt procedures used by a circuit judge.[41] A sixteen-year old girl had been found delinquent after a shoplifting incident and had three times been placed in a detention facility, following hearings, for failure to attend school. On the fourth occasion, she was ordered to the facility without a formal hearing. At issue in the appeal was whether the court could, on its own motion, order the detention. The appeals court concluded, following the precedent of *In re Gault*,[42] that juveniles are entitled to the same constitutional safeguards as adults, and that the local court was obligated to follow all the procedures contained in Wisconsin's contempt statute, including a hearing before incarceration.

A California court considered the question of whether a status offender could be held in contempt for failing to attend school.[43] The student had been assigned to forty-eight hours in a locked facility with time off to attend school. California law specifically forbids the use of locked facilities for truants. The appeals court concluded, however, that the statute had not precluded the use of juvenile contempt proceedings to accomplish the same end.

A Georgia court found a sixth-grade student "unruly" and placed the student under court supervision for missing numerous school days. The student's mother argued that the child had been legitimately absent from school, but the long pattern of absences caused the Georgia Court of Appeals to sustain the lower court's ruling.[44]

New York City began a "Truancy Patrol Program" in 1981. Minors can be arrested without warrant and returned to school. A student involved in assaulting a police officer who was attempting to return him to school subsequently argued that, because the offense was noncriminal in nature, he could not be charged with the assault of an officer in the performance of his duties.[45] Assault of an attendance officer is, under New York law, third-degree assault, while assault of a police officer is chargeable as second-degree assault. The New York City court found that the noncriminal detention of truants was, in fact, the officer's lawful duty and that the more serious charge applied.

40. McDonough v. Ney, 599 F. Supp. 679 (D. Me. 1984).
41. *In re* B.L.P., 345 N.W.2d 510 (Wis. Ct. App. 1984).
42. 387 U.S. 1 (1967).
43. *In re* Michael G., 214 Cal. Rptr. 755 (Cal. Ct. App. 1985).
44. *In re* A.D.F., 335 S.E.2d 144 (Ga. Ct. App. 1985).
45. *In re* Julio R., 492 N.Y.S.2d 912 (N.Y. Fam. Ct. 1985).

BILINGUAL-BICULTURAL PROGRAMS

An Illinois district court class action suit filed on behalf of Spanish-speaking children challenged the administration of that state's law on transitional bilingual education.[46] The statute requires school districts to identify children of limited English-speaking ability and, if they number more than twenty, to provide a bilingual education program. The suit sought a mandatory injunction requiring the state board to develop regulations for the program, to be followed by local districts, and requiring the districts to provide the services. The plaintiffs charged that the failure of the state to act violated their federal rights under the Equal Educational Opportunities Act of 1974 (EEOA), title VI of the Civil Rights Act of 1964, and the fourteenth amendment.

The defendants in the case responded by asserting that the eleventh amendment barred a federal suit against the state, following the Supreme Court's holding in *Pennhurst State School and Hospital v. Halderman*.[47] In *Pennhurst*, the Court concluded that federal suits against state officials were possible only if the suit challenged the constitutionality of a state statute or of a state official's action. The plaintiffs countered by arguing that *Pennhurst* did not apply because the defendants' failure to implement the state law also was a violation of federal law. The district court, however, rejected this argument and held that the eleventh amendment did apply. Therefore, the plaintiff's federal complaint requesting relief for state law violations was dismissed.

The district court also concluded that the EEOA required only that states set up a program for bilingual education, leaving it to local school districts to implement the plan. Contrary to the plaintiff's assertions, the district court found that Illinois had developed such a plan. The court also rejected the title VI and fourteenth amendment arguments made by the plaintiff, holding that intentional discrimination must be proved before defendants could prevail.[48] The plaintiffs had not alleged purposeful discrimination nor past *de jure* discrimination. While dismissing all parts of the complaint, the plaintiffs were directed to file their complaint against local school districts for failing to provide the program as required by state law.

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46. Gomez v. Illinois Bd. of Educ., 614 F. Supp. 342 (N.D. Ill. 1985).

47. 465 U.S. 89 (1984).

48. *See* University of Cal. Regents v. Bakke, 438 U.S. 265 (1978), modifying Lau v. Nichols, 414 U.S. 563 (1974); Washington v. Davis, 426 U.S. 229 (1976) and subsequent Supreme Court desegregation cases.

PRIVATE AND PAROCHIAL SCHOOLS

Cases involving the transportation of private school students continued to be heard in 1985. Constitutional challenges to state laws providing transportation to private school students have been resolved in favor of the service, holding that the safety of pupils outweighs any indirect benefit to the schools themselves. Litigation in this area has therefore reached the point where fine points of statutory interpretation are being argued, rather than major issues.

Rhode Island law requires public school districts to pay for the transportation of private school students. The constitutionality of the law has been upheld,[49] but the portion of the statute requiring private schools to declare they served students in at least one of five state transportation districts was challenged.[50] The law compels a public school district to provide transportation for a private school student within the transportation zone where the student resides. The petitioner lived within the zone where the school was located, but the public school committee sought to avoid the charge by claiming that the law did not apply to private schools serving students from out of state or from more than one transportation district. A Rhode Island justice rejected this interpretation and the plaintiff's request for *certiorari*, holding that the statute required only that the student live in the same zone where the school was located.

Massachusetts has a statute requiring transportation of private school students to schools located within the boundaries of a public district, so long as the distance exceeds two miles. The law took effect on January 1, 1984 but was not accompanied by any increase in state transportation aid to local school districts. Several public school districts filed suit, arguing that they were not obligated to fund the additional transportation costs because "Proposition 2½"[51] required the state to fund the new service if it was to be provided. Proposition 2½ was enacted to prevent the state from enacting laws mandating expenditures by local cities and towns.

State defendants sought to escape the conclusion that the statute was, in effect, not binding on localities by arguing that a "specific statute," such as the transportation requirement, took precedence over the "general" funding requirement. The Massachusetts high court rejected this argument, as well as the suggestion that general

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49. Jamestown School Comm. v. Schmidt, 699 F.2d 1 (1st Cir. 1983), *cert. denied*, 464 U.S. 851 (1983).

50. Cumberland School Comm. v. Harnois, 499 A.2d 752 (R.I. 1985).

51. Mass. Gen. Law ch. 29 § 27C (1983).

school aid be used to fund the service, holding that the legislature had an obligation to fund it with a specific appropriation if it intended the service to be required.[52]

Ohio law requires local districts to provide "reasonable and practical" transportation costs for private school students, and a state board of education process has been established to resolve disputes regarding decisions by local boards when the service is denied. The process involves the use of a referee to advise the state board. In a case heard by the Ohio Supreme Court, the referee had recommended payment of disputed charges, holding that the local district had misrepresented and inflated the cost.[53] The state board denied the service, however, and litigation commenced. The local district sought to argue that excessive cost was grounds, under the statute, to render the service "unreasonable." The Ohio court, however, refused to reach a decision on this larger question, holding instead that the district's attempt to inflate the cost was adequate justification to overrule the state board decision. The district was ordered to provide the service.

An effort by the South Dakota legislature to provide textbooks to students enrolled in private schools has been the subject of litigation in several courts. In 1976, the South Dakota Supreme Court held that such a loan violated the highly restrictive section of the state constitution barring aid "in every form" to sectarian institutions.[54] The legislature subsequently enacted a different textbook loan statute in an effort to evade the 1976 holding. Additional classes of persons eligible to receive the textbooks were added and a statement of legislative policy accompanied the revised law. The changes did not impress the South Dakota court, which held that a change in the state constitution would be needed to make any textbook sharing possible.[55]

Indiana has had a state statute for more than fifty years which provides that parochial school children may be provided transportation on a "seats available" basis, so long as they live on an established bus route. Parents of parochial school children filed suit challenging the limited availability of transportation, alleging that the state's failure to provide the service to all children equally violated their equal protection and free exercise rights. The case was remanded to Indiana courts for a resolution of state constitutional issues.[56] The

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52. Town of Lexington v. Massachusetts Comm'r of Educ., 473 N.E.2d 673 (Mass. 1985).

53. Pushay v. Walter, 481 N.E.2d 575 (Ohio 1985).

54. McDonald v. Yorkton Ind. School Dist. No. 1, 246 N.W.2d 93 (S.D. 1976).

55. Elbe v. Yorkton Indep. School Dist. No. 63-3, 372 N.W.2d 113 (S.D. 1985).

56. Frame v. South Bend Community School Corp., 480 N.E.2d 261 (Ind. Ct. App. 1985).

state appeals court, using a rational basis test, concluded that the need to control costs was one of several valid reasons for the failure to provide the service equally. Likewise, the fact that slightly higher transportation costs caused the plaintiffs to spend more for their free exercise of religion did not constitute a violation of free exercise rights. The long standing statute was, therefore, left untouched.

A Pennsylvania kindergarten student was five days short of the required age to enter a public school program. His father then enrolled him in a private kindergarten with a younger age limit. The public school system, however, refused to transport the student, claiming that they were required to do so only if the student were eligible to attend public school. Noting that this was a case of first impression, an appeals court affirmed an injunction issued by a lower court ordering the district to provide the service, brushing aside the district's claim of "substantial adverse economic impact."[57]

Parents enter into contracts with private schools for the education of their children. A Louisiana case considered the question of whether parents were entitled to a refund when they broke the contract and enrolled their child in a different school.[58] The contract they had signed permitted them a refund if the parent was transferred from the area by an employer, the child had a catastrophic illness, or the student was expelled. While not fitting these criteria, the father alleged that the school's failure to look for a replacement for their child relieved him of his duty to honor the contract. The appeals court disagreed, finding that the school's failure did not relieve the parent of his obligation to follow the plain language of the contract.

Parents of a student expelled from the Howe Military School brought a breach of contract action against the school when their son was expelled for repeated violations of the conduct rules in the school's handbook.[59] The student had earned so many points for rule violations that he had the school's worst conduct record. He also had been involved in the brutal beating of another cadet. Observing that he had been admitted to the school under a conditional agreement which involved following the rules, and that he and his parents had been repeatedly warned about his conduct, the district court refused to find any violation of the plaintiff's contract rights in the expulsion.

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57. Unionville-Chadds Ford School Dist. v. Rotteveel, 487 A.2d 109 (Pa. Commw. Ct. 1985).

58. Moyse v. Runnels School, Inc., 457 So. 2d 767 (La. Ct. App. 1984).

59. James v. Howe Military School, 604 F. Supp. 122 (N.D. Ind. 1984).

SCHOOL SPORTS

The increased popularity of minimum academic average requirements for student athletes has led to court tests in several jurisdictions. Up to this point, academic eligibility rules have withstood a variety of challenges. In one 1985 case, the Texas Supreme Court upheld a rule requiring athletes to have a seventy average in all but "honors or advanced classes."[60] The "no pass, no play" requirement was attacked on equal protection and substantive due process grounds. Finding that athletic competition was not a fundamental right, the Texas court used a rational state interest test to decide the equal protection issue. The court quickly concluded that the rule was related to the legitimate state interest in providing a quality education to students.

It also was argued that the rule violated students' substantive due process rights by giving principals complete discretion over the definition of "honors or advanced classes." The court refused to address this issue, however, finding that the students involved in the challenge had not suggested they had failed such courses. The rule was upheld, with the court also observing that a lower court would have to address the issue of when it actually became effective.

One of the nation's first academic eligibility requirements, West Virginia's 2.0 average, with no courses failed, was upheld by that state's highest court in 1984.[61] The same court heard an appeal from the state superintendent when a local court refused to dissolve its injunction against the enforcement of the rule. The lower court injunction prevented the rule's application to a wrestler whose average had fallen below 2.0. The superintendent's petition, filed against the judge, was sustained by the higher court, which held that the state district court had abused its discretion in awarding the injunction.[62]

State Athletic and Activity Associations

Challenges are filed each year to the eligibility rules established by state athletic associations. While the right to play on sport teams has never been held to be constitutionally protected, associations must follow procedures that comport with due process requirements.

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60. Spring Branch Indep. School Dist. v. Stamos, 695 S.W.2d 556 (Tex. 1985).
61. Bailey v. Truby, 321 S.E.2d 302 (W. Va. 1984). *See* The Yearbook of School Law 1985 at 101.
62. Truby v. Broadwater, 332 S.E.2d 284 (W. Va. 1985).

As recognized state agents, the association rules must meet rational relationship tests, and the decisions of the associations must be made following procedures that afford those affected by the rules the opportunity to appear and participate.

In an interesting constitutional challenge to an association eligibility rule, discussed in last year's chapter, a rule banning participation of nonstate residents in school athletics was challenged in an Ohio federal district court.[63] The plaintiffs lived in Kentucky and attended school in Cincinnati. They argued that the privileges and immunities clause of article IV, section 2 of the United States Constitution prevented the residents of one state from treating those from another state differently. The district court rejected the challenge, holding that secondary school athletic participation was not a right "sufficiently fundamental" to sustain the challenge to the differential treatment. The case then was appealed to the Sixth Circuit Court of Appeals.

The appeals court sustained the lower court decision, finding "no way in which the right to participate in interscholastic sports is fundamental or basic to the nation's vitality or interstate harmony."[64] Although the plaintiffs sought to argue that the Supreme Court had never meant the clause to apply only to fundamental rights, the appeals court rejected that analysis. As authority for this position, they pointed to two recent cases decided by the Court.[65] Finding no fundamental right, the appeals court upheld the participation rule as bearing a substantial relation to the state's interest in prohibiting the recruitment of out-of-state student athletes.

The parents of a Texas student appealed the dismissal by a federal district court of a complaint filed against an athletic association which had declared the student ineligible to play football. The student claimed that a variety of his state and federal rights were violated when coaches and a district committee refused to declare him eligible to play. While not wishing to be a "super referee" over high school programs, the Fifth Circuit Court of Appeals held that the district court had erred in dismissing the plaintiff's state law claims without remanding them to a state court for a hearing.[66]

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63. Alerding v. Ohio High School Athletic Ass'n, 591 F. Supp. 1538 (S.D. Ohio 1984). *See* The Yearbook of School Law 1985 at 100-1.

64. Alerding v. Ohio High School Athletic Ass'n, 779 F.2d 315, 317 (6th Cir. 1985).

65. United Bldg. and Constr. Trades of Camden County v. Mayor and Council of Camden, 465 U.S. 208 (1984); Supreme Court of New Hampshire v. Piper, 105 S. Ct. 1272 (1985).

66. Hardy v. University Interscholastic League, 759 F.2d 1283 (5th Cir. 1985).

A Kentucky case was decided on a technicality when an appeals court held that the state association had not been made a formal party in the case.[67] A lower court had held that a student had improperly been declared ineligible to play on teams when his school district dissolved and he transferred to a school outside his county. The appeals court dismissed the lower court injunction, holding that only the state athletic commissioner, and not the association itself, had been made a party to the case. Without an "indispensable party" involved in the case the order should not have been issued.

Two athletic associations competed in a case before a New York appeals court.[68] The state association rule in question prohibited high school soccer players from participating in nonschool soccer leagues once the student participated in a game on a high school team. An association of nonschool soccer clubs challenged the rule on the grounds that it was arbitrary and violated the family decision-making rights of parents as protected by the first and ninth amendments. While a local court sustained this challenge and issued an injunction, it was dissolved on appeal. The appeals court concluded that the rule was related to the school's desire that sports not consume too much of a student's time.

A similar rule on outside soccer play was upheld by a Texas appeals court.[69] The rule prohibited outside play by students who were on a varsity team in the previous year, but permitted it for those who were not. The appeals court refused to find that the rule violated the students' equal protection rights, concluding that it helped give students more time to study and prevented teams in areas where soccer clubs were organized from having a competitive advantage.

The reorganization of an athletic conference in Louisiana led to litigation. The association constitution set limits on the size of schools in each competition category. These were changed by a committee of the association, but the association's constitution was not altered. A school principal challenged the plan, on a variety of grounds, and a lower court entered a directed verdict against the plaintiff. On appeal, the appeals court held that the association's action was subject to due process requirements and therefore required a vote by its mem-

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67. Mills v. Buell, 685 S.W.2d 569 (Ky. Ct. App. 1985).

68. Eastern New York Youth Soccer Ass'n v. New York State Pub. High School Athletic Ass'n, 488 N.Y.S.2d 293 (N.Y. App. Div. 1985).

69. University Interscholastic League v. North Dallas Chamber of Commerce Soccer Ass'n, 693 S.W.2d 513 (Tex. Ct. App. 1985).

bership as outlined in the association constitution.[70]

Discrimination and School Sports

A state department of education rule prohibiting mixed-sex competition in several sports was challenged by the parents of a sixteen-year-old female student who wanted to play junior varsity football at her Yonkers, New York high school.[71] The student filed a section 1983 action claiming the rule violated title VI of the Educational Amendments of 1972, 20 U.S.C. section 1681 and her equal protection rights. The court observed that title VIdid not apply to contact sports. It did find, however, that "every court which has considered questions like this one" has ruled that a female student should be given a chance to try out for teams in sports where there were no separate female teams. The court therefore ordered that the student be given a chance to compete.

An Arkansas district court considered the question of damages in a case involving a coach alleged to have made racist comments and to have treated black athletes unfairly.[72] The minority-group athletes had refused to participate in a football game after the coach refused to certify the election of a black homecoming queen who had been elected by majority vote of the team. The coach then dismissed the players from the team. The district court had entered orders reinstating the players and ordering the use of voting machines to select the homecoming queen. The coach, who had admitted using racial slurs, was found to have exhibited a "willful, malicious and conscious indifference" to the constitutional rights of two players. He was ordered to pay $1,250 to each, plus legal fees. Other school officials were dismissed from the case.

Coaches sometimes have grooming rules that go beyond those reasonably related to the safety of players, but that contribute to "team discipline." A Louisiana coach prohibited mustaches on football players and his rule was challenged by two students. An appeals court held the rule was reasonably related to the coach's "total discipline program" that had led to both academic and athletic success for his players.[73]

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70. Bodker v. Louisana State High School Athletic Ass'n, 472 So. 2d 941 (La. Ct. App. 1985).

71. Lantz v. Ambach, 620 F. Supp. 663 (S.D.N.Y. 1985).

72. Boyd v. Board of Directors of McGehee School Dist. No. 17, 612 F. Supp. 86 (E.D. Ark. 1985).

73. Humphries v. Lincoln Parish School Bd., 467 So. 2d 870 (La. Ct. App. 1985).

SUBSTANTIVE RIGHTS OF STUDENTS

Search and Seizure

The major question argued in 1985 school search and seizure cases concerned the degree of suspicion required when officials search students. Courts have long held that school officials are agents of the government to whom the constitutional prescriptions against unreasonably searches and seizures apply. Courts generally have agreed that a reasonable suspicion standard is adequate where the evidence seized is used only in school discipline proceedings, as distinct from juvenile court action. In cases where criminal prosecution of a student results from a school search, however, courts have been divided on whether a more rigorous probable cause standard is required. Finally, the question of whether the exclusionary rule, the prohibition against the use of evidence seized in a search that violated the fourth amendment, applies to school searches also is unsettled.

These issues were considered in a long-awaited decision by the United States Supreme Court in *New Jersey v. T.L.O.* The New Jersey Supreme Court had ruled that a school principal had improperly searched a student's purse for cigarettes, after suspecting her of smoking in a lavatory, when possession of cigarettes itself was not a violation of school rules.[74] The principal, who had found the student in the smoke-filled restroom, sought evidence to charge the student with violating the school rule against smoking in school. The search, once started, uncovered evidence that the student had been selling marijuana. She ultimately was placed on probation for violating criminal statutes. The New Jersey court set aside the conviction on the basis that the evidence for the conviction was taken in a search conducted while the principal was "rummaging" in the student's purse and, therefore, was not admissible in the criminal proceedings.

The Supreme Court reversed the New Jersey court's conclusion that the search was unreasonable.[75] It did so, however, without clarifying a number of issues, including the applicability of the exclusionary rule in school searches. The Court focused on the search for the cigarettes, concluding that this search was reasonable. A search, the majority opinion held, will be "justified at its inception" when there are "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the

74. New Jersey v. T.L.O., 463 A.2d 934 (N.J. 1983).
75. New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

rules of the school.[76] As to the limits on searches, the Court held, "[s]uch a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[77] Thus the Court created a balancing test to determine the propriety of school searches.

This test was objected to in an opinion by Justice Blackmun, who concurred only in the judgment. He wrote, "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."[78] Justices Brennan and Marshall, in their dissent, attacked the balancing test more directly, arguing that the failure to use a probable cause standard would lead to unwarranted intrusions on student privacy. They also argued that the balancing test would leave school officials uncertain as to how to proceed in search situations. Justice Stevens, in a separate dissenting opinion, argued for a different standard that would focus more on the seriousness of the offense, observing that a search related to a school dress code violation merited different standards than one involving drug sales.

The Court's decision in *T.L.O.* was handed down in January 1985, so there was ample opportunity in that year for other courts to wrestle with the standards for school searches that it established. In one such case, the Supreme Court of California considered the search of a student's calculator case that uncovered plastic bags filled with marijuana.[79] The student ultimately was placed on probation for three years and appealed his juvenile court conviction. The search occurred when an assistant principal stopped the student to inquire why he was late for an afternoon class. Though the student had finished classes for the day, his "furtive gestures" caused the principal to search the case. The student's attorney argued that probable cause was needed for the search while the state argued that the reasonable suspicion standard should be used.

The California court concluded that *T.L.O.* had established the reasonable suspicion standard but that the facts of the case made this particular search unreasonable. The court observed that the student had never previously been charged with a drug violation, and con-

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76. *Id.* at 744.
77. *Id.*
78. *Id.* at 750.
79. *In re* William G., 709 P.2d 1287 (Cal. 1985).

cluded that trying to shield a private possession from view could not, alone, trigger a reasonable suspicion "if a student's limited right to privacy is to have any meaning."[80]

In a different California case, a student who also was not in class during school hours was searched when a boy's dean thought he was behaving suspiciously in a lavatory. Marijuana and cocaine were found in the student's wallet, and he was placed on probation following a juvenile court proceeding. On appeal, a California appeals court found that the search satisfied the "two-prong test" in *T.L.O.*[81] First, the search was justified "from its inception" because of known drug dealing in the restroom, and was reasonable because the student's failure to have a pass to be in the restroom "would arouse suspicions of a reasonably prudent person" that narcotics activity might be under way.

The use of the exclusionary rule in school discipline cases was addressed by a California appeals court.[82] A student found to possess marijuana was suspended for a year and his attorney sought to have the suspension overturned on the ground that the evidence was seized in an illegal search. The warrantless search was made by an assistant principal based on "generalized suspicion" involving the student's previous behavior and his heavy use of the school pay phone, which the principal believed was related to drug sales. The California court began by reviewing the history of the exclusionary rule in criminal and juvenile prosecutions arising from campus searches but found "sparse authority" for deciding the rule's applicability in a case where the result was only a school disciplinary sanction.

The court ultimately concluded that the exclusionary rule is fully available in criminal prosecutions and juvenile proceedings resulting from evidence illegally obtained by school officials, but drew the boundary line at that point, holding that the rule did not apply to tainted evidence used in disciplinary proceedings. In reaching this conclusion, the court drew an analogy with the rule's use in civil actions where, in the absence of statutory authorization, and even when it is the government that conducted the search, courts have not applied the rule.[83] The answer to "over-exuberant" school searches, the California court held, was to mount a challenge to the penalty imposed, an issue that was not raised in this case.

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80. *Id.* at 1298.

81. *In re* Bobby B., 218 Cal. Rptr. 253 (Cal. Ct. App. 1985).

82. Gordon J. v. Santa Ana Unified School Dist., 208 Cal. Rptr. 657 (Cal. Ct. App. 1984).

83. Immigration and Naturalization Service v. Lopez-Mendoza, 104 S. Ct. 3479 (1984).

The Supreme Court of Appeals of West Virginia upheld the juvenile court conviction of a student whose locker was searched when an assistant principal learned that another student had consumed a can of beer at the plaintiff's home that morning.[84] The principal conducted the search with the hope of finding alcoholic beverages in the locker, but found marijuana cigarettes instead. After a long discussion of *T.L.O.*, the court concluded that the search had met the reasonable suspicion standard articulated in that case.

A Washington high school student filed a section 1983 action when he was not allowed to go on a trip with his school wind ensemble because he refused to permit his suitcase to be searched by parent trip chaperons. The search policy was instituted when students on a trip two years earlier were found with liquor in their hotel room. The student's parents had sent a note with their son saying they had searched the suitcase, but they too objected to the search by other parents. A lower court dismissed the case and appeal was taken to the Supreme Court of Washington.[85]

The Washington court held that the case was not moot, since some damages for a constitutional violation could be assessed, and that the school's blanket search party violated the fourth amendment. There was no reason, the court concluded, beyond the previous incident, to believe that contraband would be found. The mere fact that it might be there was insufficient reason to conduct the search. "Further," the court concluded, "the mere announcement that a constitutional right must be waived in order to participate in a school activity cannot make the search reasonable."[86]

Anonymous phone calls to a school dean led to two searches. In the first, the caller reported that marijuana was in a school locker. It was found and, a few hours later, a second call reported that a student had drug paraphernalia in the lining of his coat. The second tip also was accurate and the student involved sought federal court review after the search revealed a pipe for marijuana.[87] The student, who was expelled for the remainder of the school year, but not charged with a criminal offense, argued that he was entitled to damages for an unconstitutional search. The court disagreed, holding that the reliable tipster had provided the reasonable suspicion, and perhaps even probable cause, for the search to be made. The role of a uniformed police officer, at the school on another case, who urged the student to submit to the search, was not found to affect the reasonableness of the search.

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84. West Virginia v. Joseph T., 336 S.E.2d 728 (W. Va. 1985).
85. Kuehn v. Renton School Dist. No. 403, 694 P2d 1078 (Wash. 1985).
86. *Id.* at 1082.
87. Martens v. District No. 220, 620 F. Supp. 29 (N.D. Ill. 1985).

First Amendment Religious Rights

The United States Supreme Court in 1985 decided three cases concerning the first amendment religious rights of public school students. Two companion decisions addressed the use of sectarian school space for programs funded by public agencies while the third considered the question of a "moment of silence" at the start of the public school day. Silent meditation laws have been enacted in several states, generally with the intention of circumventing previous Court decisions barring prayer in the public schools.

The shared time and community education program sponsored by the Grand Rapids, Michigan, school district involved the use of public school teachers who offered courses to students enrolled in forty-one private schools, forty of which were religious schools. The instruction took place on the premises of religious schools. The community education program consisted of voluntary, after-school courses in the same institutions taught by private school instructors paid with public funds. The community education programs were directed by parochial school officials. A federal district court had held that both of these funding arrangements had the primary or principal effect of advancing religion, thereby violating the establishment clause.[88] The Sixth Circuit Court of Appeals affirmed,[89] and the case was appealed to the Supreme Court. The Court's decision was split, with five justices voting that both programs violated the establishment clause while two additional justices found that only the community education offerings offended the first amendment.[90] In reaching its decision, the majority explicitly stated that the three-part test developed to measure establishment cases in *Lemon v. Kurtzman*[91] should be used in this instance. The *Lemon* test requires that the program or statute have a secular legislative purpose, a principal effect that neither advances nor inhibits religion, and must not excessively entangle the state with religious institutions. Dissents in this and its New York City companion case sought to reduce the Court's reliance on *Lemon* in addressing public school religion issues.

In looking at the Grand Rapids programs, the majority concluded

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88. Americans United for Separation of Church and State v. School Dist. of Grand Rapids, 546 F. Supp. 1971 (W.D. Mich. 1982). *See* The Yearbook of School Law 1983 at 188.

89. Americans United for Separation of Church and State v. School Dist. of Grand Rapids, 718 F.2d 1389 (6th Cir. 1983). *See* The Yearbook of School Law 1984 at 158.

90. Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985).

91. 403 U.S. 602 (1971).

that they provided a "direct cash subsidy" to private schools. For example, 10% of private-school classes were paid for with shared time program funds. In addition, the majority concluded that state-paid private school instructors in the community education program might "subtly or overtly indoctrinate the students" with religious teachings. Finally, the majority felt the programs provided a "symbolic union of church and state" that would convey a message of state support of religion to impressionable students. The court's decision built on a previous case that voided the loan of teachers to nonpublic schools as unconstitutionally providing state support to private schools.[92]

In a second five-to-four decision, the Court also held that the use of public school teachers in private schools to offer title I programs violated the first amendment.[93] The New York City programs had been approved by a district court,[94] which held that title I of the Elementary and Secondary Education Act of 1965 did not violate the first amendment in funding remedial programs in nonpublic schools. The Second Circuit Court of Appeals reversed,[95] holding that title I and a successor act [96] inevitably entangled the state with religion when public employees supervised the instruction. The Court's majority opinion sustained the Second Circuit reasoning in the case. The majority observed that the aid was provided in a "pervasively sectarian environment" and that "ongoing inspection" by public authorities would be required to ensure the absence of a religious message in the instruction.[97]

In separate dissents, the Chief Justice and Justice White attacked the Court's reliance on the *Lemon* test. Justice Rehnquist, in a brief dissent, attacked the "Catch 22 paradox" of requiring state supervision to ensure the lack of entanglement with religion, thereby creating the entanglement. Finally, Justice O'Connor, joined in part by Justice Rehnquist, argued that *Meek v. Pittinger* should be set aside because the risk of religious indoctrination by instructors who were teaching nonsectarian courses in public settings was "greatly exaggerated." She concluded, "[t]he only disadvantaged children who lose

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92. Meek v. Pittinger, 421 U.S. 349 (1975).

93. Aguilar v. Felton, 105 S. Ct. 3232 (1985).

94. National Coalition for Pub. Educ. and Religious Liberty v. Harris, 489 F. Supp. 1248 (S.D.N.Y. 1980).

95. Felton v. Aguilar, 739 F.2d 48 (2d Cir. 1984). *See* The Yearbook of School Law 1985 at 98-9.

96. Education Consolidation and Improvement Act of 1981, ch. 1, 20 U.S.C. § 3801 *et seq.*

97. 105 S. Ct. at 3238.

under the Court's holding are in those cities where it is not economically and logistically feasible to provide public facilities for remedial education adjacent to the parochial school."[98]

Alabama's legislature enacted a statute in 1978 that authorized a one-minute period of silence "for meditation" at the start of the school day. In 1981, the statute's purpose was amended to authorize a period of silence "for meditation or voluntary prayer." While other parts of the statute, including a prescribed prayer, were struck down in recent years, the 1981 version of the moment of silence was challenged, and ultimately that challenge reached the Supreme Court. A district court had enunciated the novel interpretation that states had the power to establish a state religion[99] and therefore upheld the "meditation or prayer" wording. The Eleventh Circuit Court of Appeals reversed.[100]

The Supreme Court majority sustaining the Eleventh Circuit focused on the intent of sponsors in order to decide the case.[101] The sponsor had made it clear that the change in the statute's wording was a "step in the right direction" on the path of reintroducing prayer in the schools. The six-to-three majority was unwilling to sanction such a trip. Instead, using the *Lemon* test, the sponsor's intention was used to prove that the change was not motivated by any clearly secular purpose. The Court also observed that there was nothing to prevent a student from praying during the moment of silence already authorized by the Alabama legislature. Concurring opinions by Justices Powell and O'Connor stressed the point that moments of silence had received implied endorsement from the Court, with the caution that statutes must not endorse prayer over other alternative activities during the silence.

In dissent, the Chief Justice observed that it was difficult to use the sponsor's intent as the means of judging the constitutionality of a moment of silence law. "There is not a shred of evidence," he wrote, "that the legislature as a whole shared the sponsor's motive."[102] Justice White offered a brief dissent, observing that he had been "out of step" with the Court's majority in establishment clause cases for some time. Justice Rehnquist offered an historical analysis of some length, urging a rereading of the documents describing the original debate on the first amendment when the Constitution was written. He argued that the Court's establishment clause decisions since *Everson v. Board of*

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98. *Id.* at 3248.

99. Jaffree v. Board of School Comm'rs of Mobile County, 554 F. Supp. 1104 (S.D. Ala. 1983).

100. Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983).

101. Wallace v. Jaffree, 105 S. Ct. 2479 (1985).

102. *Id.* at 2506.

Education[103] had been "neither principled nor unified."[104] In his dissent, he also characterized *Lemon* as "a determined effort to craft a workable rule from an historically faulty doctrine,"[105] and argued that states have the power to offer a "generalized endorsement" of prayer.

Litigation over New Jersey's moment of silence statute continued in 1985, with the Third Circuit Court of Appeals considering a lower court declaratory judgment that the statute was unconstitutional.[106] The statute provided for a moment of "quiet and private contemplation or introspection." After a lengthy discussion of the Alabama statute at issue in *Wallace v. Jaffree*, the Third Circuit refused to find a clear endorsement of moments of silence in the Supreme Court majority opinion. Next applying the traditional *Lemon* test, the appeals court could find no secular purpose for the New Jersey statute and therefore declared that it violated the first amendment establishment clause. In dissent, one appeals court judge argued that a permissive statute could not be read as an active accommodation of religion. From the perspective that statutes are presumptively constitutional, he concluded that there was inadequate evidence that the statute had a religious purpose sufficient to overcome the presumption.

The West Virginia district court considered a challenge to that state's constitutional amendment allowing a brief time at the start of school for "personal and private contemplation, meditation or prayer."[107] The plaintiffs in the case, of varying religious faiths, had presented testimony that students who were silent but failed to pray, or appear to pray, had been castigated by other students. In reviewing the amendment, the court employed the analysis suggested by *Jaffree*, looking at the intent of the amendment's sponsors to ensure that there was a secular purpose. The court in so doing found that the history revealed "beyond doubt" that the purpose of the amendment's creators was to return prayer to West Virginia's public schools. In addition to a lack of secular purpose, the court found that the law failed the other two parts of the analysis suggested in *Lemon*. Finally, the court observed that while people were free to pray anywhere, anytime, it was its observation that the West Virginia constitutional amendment was "a hoax conceived in political expediency" by persons who wanted to convince voters that a large majority vote could overturn provisions of the United States Constitution.

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103. 330 U.S. 1 (1947).
104. 105 S. Ct. 2479, 2516 (1985).
105. *Id.* at 2518.
106. May v. Cooperman, 780 F.2d 240 (3d Cir. 1985).
107. Walter v. West Virginia Bd. of Educ., 610 F. Supp. 1169 (D.W. Va. 1985).

A federal district court in Michigan heard a request for an injunction from teachers and parents concerned about the practice of some teachers who were praying and reading from the Bible in classrooms.[108] Also at issue was a Bible club that met at noon at the Allendale Elementary School. Plaintiffs in the case sought an order directing the Michigan state superintendent to order an end to the practice while, in response, teachers and parents sought an order preventing the superintendent from interfering with their right to continue their religious exercise. They argued that there was no state action involved in the activities.

The district court disagreed with the state action argument, finding that teachers clearly were state actors for the purpose of an establishment clause analysis. While observing that the line between freedom to practice and freedom from an unwanted religious message was sometimes difficult to establish, the court had no difficulty in doing so in this case. The court concluded that the practice fell squarely within the practices outlawed by the Supreme Court in early school prayer cases.[109] As to the Bible club, the court concluded that further arguments were needed before reaching a conclusion.

Legal challenges to the use of certain textbooks or other materials, on the ground that they violate the first amendment religious rights of students, sometimes are mounted. In a 1985 challenge, parents claimed that *The Learning Tree*, by Gordon Parks, which had been assigned in their daughter's sophomore English literature class, violated her religious rights. A district court granted a summary judgment to the school district and the parents appealed. The district court also denied attorney fees and the defendants cross-appealed.[110]

The Ninth Circuit had no trouble in affirming the lower court's dismissal of the first amendment claims. The student had been assigned an alternative book as soon as the parents complained and was given permission to avoid classroom discussions of the book. While the parents claimed the book represented "secular humanism" and therefore was "anti-religion," the court refused to see its use within a group of "religiously neutral books" assigned to the class as constituting the establishment of religion or anti-religion. The lower court's denial of fees also was upheld as not representing an abuse of discretion.

A group characterized by the Sixth Circuit Court of Appeals as "fundamentalist Christians" brought suit alleging, among other

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108. Breen v. Runkel, 614 F. Supp. 355 (W.D. Mich. 1985).

109. Engel v. Vitale, 310 U.S. 421 (1962); Abington Township School Dist. v. Schempp, 374 U.S. 203 (1963).

110. Grove v. Mead School Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985).

things, that the use of textbooks published by Holt, Rhinehart and Winston, in the school attended by their children, violated their religious rights. Among their objections to the textbooks, the parents claimed they taught witchcraft and idol worship. A district court granted a summary judgment to the school district and the parents appealed.[111] At issue in the appeal was the parent's fifth allegation, that the books instructed children that it was not necessary to believe in Jesus to achieve salvation. On this issue, the Sixth Circuit Court concluded that the district court had been too hasty in resolving a factual dispute without affording the parties an opportunity to argue the case.[112] It was therefore remanded for a hearing.

Louisiana's "creation-science law," requiring public schools to give balanced treatment to creation-science and to evolution-science, finally was found unconstitutional by the Fifth Circuit.[113] The case had previously been before the appeals court after a district court held that the statute violated the state constitution. The Fifth Circuit remanded the question to the Louisiana Supreme Court, which found no violation of that state's constitution.[114] The case next was remanded to the district court for a determination of federal issues. That court issued a summary judgment against the statute and the state appealed.

At issue was whether the "Balanced Treatment Act" violated the first amendment by requiring a religious belief. Concluding that the theory of creation was, in fact, a religious belief, the appeals court held the law unconstitutional. "The Act's intended effect is to discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism, a religious belief. The statute therefore is a law respecting a particular religious belief. For these reasons, we hold that the Act fails to satisfy the first prong of the *Lemon* test and thus is unconstitutional."[115]

A protracted challenge to the Oklahoma voluntary prayer statute had a number of consequences for the plaintiff parents in the case, whose home was burned by a fire of suspicious origin and whose children were called "devil worshipers" in addition to being subjected to other forms of verbal and physical abuse. When the harassment continued, they moved to an adjoining school district, whereupon the district they had left argued that they had lost standing to pursue the

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111. Mozert v. Hawkins County Pub. Schools, 579 F. Supp. 1051 (E.D. Tenn. 1984), and 582 F. Supp. 201 (E.D. Tenn. 1984).
112. Mozert v. Hawkins County Pub. Schools, 765 F.2d 75 (6th Cir. 1985).
113. Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985).
114. Aguillard v. Green, 440 So. 2d 704 (La. 1983)
115. Aguillard v. Edwards, 765 F. 2d 1251, 1257 (5th Cir. 1985)

case. This, and a variety of other arguments advanced by the defendants, were rejected by the Tenth Circuit in the 1985 round of this litigation.[116]

The challenged practices of the district included before-school religious meetings and an assembly policy that included evangelist speakers, the latter occurring in the face of a district court injunction against the elementary school practices. The appeals court concluded that the challenged activities created excessive entanglement with religion.

The bulk of the Tenth Circuit decision, however, focused on the plaintiff's request for damages. While the district court had denied compensatory and punitive damages, on the theory that the plaintiffs had failed to prove they were harmed by the denial of their first amendment rights, the Tenth Circuit reversed on this point. Finding that *Carey v. Piphus*[117] directs lower courts to look for analogous common law torts that permit the recovery of presumed damages, the court focused on the deprivation of voting rights as the analogy to use in this case. The court then concluded that some substantial award was appropriate, especially to serve as a deterrent to further deprivations. The court remanded the question of compensatory damages and also the issue of punitive damages, observing that *Smith v. Wade*[118] held that punitive damages were available under section 1983 for conduct shown to be motivated by "evil motive or intent."

Courts have decided challenges to prayers at high school commencement ceremonies with contradictory results. In the first of two 1985 challenges, a Michigan district court held that a student-led benediction and invocation, while in the "grey area" of establishment clause doctrine, did not violate the first amendment.[119] In this case, the court saw the prayers not only as "primarily secular," but also as a way of signifying the beginning and end of the ceremony. Taken in their context, the court held that the short student-led prayers could hardly be characterized as an attempt by the school to advance religion. Thus, using the *Lemon* analysis, the prayers were allowed to proceed.

An Iowa district court, presented with a similar set of facts, reached the opposite conclusion.[120] In this case, the prayers were offered by a minister, but otherwise were the same in content as those

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116. Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391 (10th Cir. 1985).
117. 435 U.S. 247 (1978).
118. 461 U.S. 30 (1983).
119. Stein v. Plainwell Community Schools, 410 F. Supp. 43 (W.D. Mich. 1985).
120. Graham v. Central Community School Dist. of Decatur, 608 F. Supp. 531 (S.D. Iowa 1985).

approved in Michigan. The Iowa court, however, concluded that the prayers had a Christian religious purpose, thereby running afoul of the *Lemon* requirements. In defense of its injunction, the court observed that the facts in this case were "more thoroughly developed" than in cases where the prayers were approved. In this instance, the record demonstrated that the school board and community leaders had felt it appropriate that a Christian message be conveyed.

First Amendment Freedom of Expression

The attempts by a high school student organization to hold a "Peace Fair" on a school athletic field provided the first court test involving the Equal Access Act. The Act was passed by the Congress and signed into law on August 11, 1984.[121] It requires school districts receiving federal funds and having a "limited open forum" to make that space available to students without regard to the programmatic content of the meeting. The Act was passed after some federal district courts had refused to extend to secondary schools the Supreme Court ruling in *Widmar v. Vincent*,[122] that universities creating a limited open forum for approved student groups could not deny equal access to student religious groups.

The request for the antinuclear peace fair was rejected on several occasions by the Lower Marion, Pennsylvania school board. The athletic field the group had requested was regularly used for nonschool community events, including an annual Memorial Day observance. The school board argued that the site was inappropriate for a "political rally." A district court issued a preliminary injunction that permitted the fair to be held on one occasion in a school gymnasium. Subsequently, the court refused to grant a permanent injunction regarding future fairs,[123] following first amendment pleadings, and, in a later decision, refused to conclude that the Equal Access Act required the approval of the request.[124] The case was appealed to the Third Circuit.

The Third Circuit Court first addressed the first amendment arguments, following the Supreme Court's recent cases regarding the

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121. 20 U.S.C.A § 4071 *et seq.* (Supp. 1985).

122. 454 U.S. 263 (1981).

123. Student Coalition for Peace v. Lower Marion School Dist., 596 F. Supp. 169 (E.D. Pa. 1984). *See* The Yearbook of School Law 1985 at 109-10.

124. Student Coalition for Peace v. Lower Marion School Dist., 618 F. Supp. 53 (E.D. Pa. 1985).

definition of public or limited public forums.[125] In the case of public forums, speech can be controlled only with a showing of compelling state interest, where speech in limited public forums, such as the playing field in question, can be limited so long as distinctions among users are reasonable. Thus, the court concluded that the board's refusal to allow political events did not violate the first amendment. The board limits would be appropriate "as long as the line it does draw is reasonable and not a subterfuge for viewpoint discrimination.[126]

In considering the Equal Access Act arguments, the court first had to answer two first impression questions. Having concluded that the Act was mandatory, unless a district received no federal aid, it faced the question of whether the Act authorized a private cause of action to enforce its provisions. The court turned to the Act's legislative history to address the issue. While an earlier version of the Act had an enforcement section, later removed, the appeals court nevertheless concluded that one was implied in the final version. Because the "guiding purpose" of Congress was to extend *Widmar* to secondary schools, the failure to include the provision might reflect merely the fact that sponsors thought it unnecessary.

Looking at the case in question, the appeals court also concluded that the Act was intended to allow nonstudents the right to use facilities as part of student-initiated activities, so long as the policy was applied evenly to all groups. At this point, however, the Third Circuit Court found itself unable to proceed further. The Act had been passed while the controversy at Lower Marion was in progress. The court concluded that the Act would apply only if a limited forum existed after the Act became law. Because there was no evidence on the record for the court to conclude that the board had created a limited open forum "broad enough to include the contemplated use," the case was remanded to the district court for a further hearing.

A student council nominating speech, delivered by a seventeen-year-old senior in Bethel, Washington, alleged by his school to be obscene and disruptive, resulted in a case heard by the Ninth Circuit.[127] The student was suspended for three days and was removed from a student ballot for graduation speakers, though subsequently he was elected on a write-in vote. In his controversial nomination speech, delivered at a student-run assembly at which attendance was volun-

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125. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Cornelius v. NAACP Legal Defense Fund, 105 S. Ct. 3439 (1985).

126. Student Coalition for Peace v. Lower Marion School Dist., 776 F.2d 431, 437 (3d Cir. 1985).

127. Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356 (9th Cir. 1985).

tary, he described the candidate he was nominating as "firm in his pants" who would "go to the very end—climax" on behalf of students at the school. The speech caused a substantial response from the audience.

The suspension and removal from the list of commencement speakers was undertaken on the ground that the speech was disruptive, because the district had an interest in maintaining civil discourse, and because it occurred at a school-sponsored event. The lower court had issued an injunction against the penalty and had awarded $278 as damages, plus costs and attorney fees. The Ninth Circuit affirmed. Using the standard in *Tinker v. Des Moines Independent School District*,[128] the appeals court found that the speech had not led to a material disruption of the school. Likewise, while the district argued that it had the power to regulate civil discourse, the court found the standard overly broad. "We fear that if school officials had the unbridled discretion to apply a standard as subjective and elusive as "indecency" in controlling the speech of high school students, it would increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools."[129] The speech at the extracurricular assembly, then, because it was neither obscene nor disruptive, was protected by the first amendment.

Parents who sought to rent a school gymnasium for evening student dances were rebuffed by school officials. They filed suit, arguing that dancing was a form of expression protected by the first amendment and that the school board was obligated to make the rental. Their refusal, it also was alleged, was due to pressure exerted by community groups believing that dancing is immoral. A district court denied the plaintiffs the injunction they sought and an appeal was made to the Eighth Circuit. In a short decision, the appeals court held that dancing was not protected by the first amendment and, even if it were, the school district had not created a public forum in its previous use of the facility, thereby maintaining the right to control its use.[130]

Following the murder of a gay Bangor, Maine resident by three high school students, a school "tolerance day" was planned. Classes were to be canceled and representatives from a dozen groups that had experienced discrimination were invited to speak, including a representative of the gay and lesbian community. Tolerance proved to be in short supply, however, as school officials received critical phone calls

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128. 393 U.S. 503 (1969).
129. 755 F.2d 1356, 1363 (9th Cir. 1983).
130. Jarman v. Williams, 753 F.2d 76 (8th Cir. 1985).

and threats in response to the gay speaker. School officials canceled the program altogether, and the teacher who had organized the program, a student, and the controversial speaker all filed suit. A lower court and then Maine's highest court both ruled that no protected rights were violated by the cancellation.[131]

While noting the case might be decided differently if it involved classroom activities, the court concluded that the teacher's right to academic freedom did not include an interest in a schoolwide program threatened by disruption. Likewise, the student did not have a right to a curriculum of her own choosing. Given the absence of a public forum at the school, the speaker similarly had no protected interest at stake, particularly because the whole program, and not just part, had been canceled. Both parties were required to assume their own costs for the appeal.

A principal who removed articles from the school newspaper that he felt intruded on the privacy of students was challenged in federal court.[132] The articles concerned teenage pregnancy and divorce, and contained interviews from students on both subjects, with the names of students disguised. In deciding whether the first amendment rights of students had been abridged, the court focused on the fact that the student newspaper was produced by students enrolled in an official journalism class. It was paid for largely with school funds and its copy was routinely checked by the class teacher and the principal. Given this set of facts, the court viewed the paper as part of the curriculum and therefore subject to reasonable control. Protection of the identity of those interviewed was held to be sufficient justification for the removal of the stories.

A section 1983 suit in Ohio sought an injunction ordering a school system to cease interfering with the production of a play for third-grade students.[133] The controversial play, *Sorcerer and Friends*, had been attacked by a small group of parents as glorifying cowardice and denigrating patriotism. Parents of the students were then asked to read the play and advise the principal whether they favored the production. The final poll was ninety to twenty-three in favor of the play but it nevertheless was withdrawn from production. A lawsuit followed.

In addressing the first amendment question, the district court observed that student participation in the play was completely volun-

131. Solmitz v. Maine School Administrative Dist. No. 59, 495 A.2d 812 (Me. 1985).

132. Kuhlmeier v. Hazelwood School Dist., 607 F. Supp. 1450 (E.D. Mo. 1985).

133. Bowman v. Bethel-Tate Bd. of Educ., 610 F. Supp. 577 (S.D. Ohio 1985).

tary and did not affect course grades. All practices were held before or after school. Thus, the case involved an extracurricular activity. Under this set of facts, the court relied heavily on a case related to the removal of books from the school library.[134] In that case and the one at hand, administrators made a judgment regarding the suppression of ideas unrelated to the school curriculum where their authority originally is greater. The court therefore ordered the play be presented at the PTA meeting where it initially was scheduled.

SANCTIONS FOR STUDENT MISCONDUCT

Suspensions and Expulsions

The number of cases involving the exclusion of students from school for disciplinary infractions declined again in 1985, with courts continuing to side with school officials in most instances. Suspension and expulsion cases rely on the Supreme Court's holdings in *Goss v. Lopez*,[135] which requires that students receive a brief hearing before being suspended. The hearing must give the student an opportunity to learn the reasons for the suspension and the opportunity to offer his side of the story. Suspensions in excess of ten days might, under the *Goss* requirements, necessitate additional due process. School expulsions require a full hearing where the student can be represented by counsel. Cases in this area traditionally challenge the hearing a student received as inadequate. As a general rule, however, courts have been unwilling to expand the *Goss* hearing requirement beyond the skeletal hearing mandated by the 1975 decision.

In a case heard by the Fifth Circuit, a student who was suspended for the remainder of the school year claimed he had been denied due process.[136] The student had been found with a bottle containing marijuana after another student informed the principal the plaintiff had been selling drugs in class. The student was suspended for three days and his parents were notified that he faced a longer suspension for the offense. At a hearing held a few days later, a three-person committee consisting of two teachers and a counselor heard statements read to them that had been signed by students whose identities were not disclosed. The statements alleged the student had sold drugs on campus.

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134. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

135. 419 U. S. 565 (1975).

136. Brewer v. Austin Indep. School Dist., 779 F 2d 260 (5th Cir. 1985).

The student, however, admitted only to a possession charge, that, under school rules, would result in a shorter suspension than the selling offense. The student was suspended for the remainder of the year and then filed an appeal on the severity of the penalty. A second hearing was held, but the suspension was upheld. He returned to school after approximately eight weeks.

After the second school hearing a district court dismissed the student's request for an injunction and his parents appealed. The plaintiffs argued that they should have had the right to cross-examine the students who signed the statements. This the court rejected, observing that it would be improper to "escalate the formality" of a student disciplinary penalty hearing to a level "not imposed even in criminal cases."[137] Juvenile court penalty hearings do not involve challenges against testimony presented. Likewise, the court refused to find that the penalty violated the student's substantive due process rights, or that the role of the principal as investigator and witness prevented him from serving as judge of the review board.

In an unusual case, students who were suspended from school for six days and from extracurricular activities for a year filed suit claiming a denial of due process. They also challenged the Nevada statute that excludes student disciplinary procedures from that state's open meetings law.[138] The students, who were accused of fighting at a basketball game, had been suspended after a meeting in their principal's office. An additional hearing was held before the school board, a hearing that gave rise to the open meeting law allegation. On the meeting charge, the court held that there was a rational basis for closing the hearing, the need to protect the privacy rights of juveniles involved in disciplinary events. On the due process challenge, the court observed that the *Goss* hearing requirement had certainly been met and gave both parties fifteen days to prepare arguments so that the court could issue a summary judgment.

The timing of two hearings and the action of the New York education commissioner in ordering the reinstatement of a student following his suspension were the issues in a New York case. The student was suspended following his arrest for assaulting and stabbing a classmate's mother. He appealed to the commissioner, who ordered him readmitted to school based on the record of the first hearing. Before the order was received by the school, a second more complete hearing was held and the student was again suspended. The school

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137. *Id.* at 263.

138. Davis v. Churchhill County School Bd. of Trustees, 616 F. Supp. 1310 (D. Nev. 1985).

ignored the commissioner's order when it arrived and the student's parents filed suit. A district court refused to issue an order compelling the student's readmission, holding that he could be suspended for a nonschool offense because he posed a danger to students.[139] The court also held that it was reasonable for the school to ignore the commissioner's order which was based only on the incomplete first hearing.

The case was appealed to the Second Circuit. The student's parents sought damages from the school for ignoring the order while the district responded with an immunity defense.[140] The appeals court concluded that the lower court's ruling that the matter was ripe for summary judgment was correct because all the facts in the case were known. The court held that "failure to heed an order that is susceptible of reasonable alternative readings is not so irrational, arbitrary or capricious as to violate due process."[141] The failure, then, did not constitute bad faith on the part of the school and the lower court decision was upheld.

The question of overly harsh penalties for school rule infractions is sometimes argued, with courts generally reluctant to find substantive due process violations in school discipline cases. In a case demonstrating this, an Illinois student was suspended from her softball team for the season when it was learned that she had attended a party at which beer was consumed. The student did not drink any beer and had been at the party for only fifteen minutes when it was raided by local police. The student was suspended for "anti-social behavior," a violation of the school's athletic code. It was discovered, however, that the coach of her team had only advised students not to attend such functions and that the rule on which her suspension was based had never been posted. In spite of these facts, an Illinois appeals court refused to interfere with the penalty, concluding that its severity did not reach a level requiring judicial intervention.[142]

The Mississippi Supreme Court heard an appeal from parents whose daughters had been suspended for a semester for painting a numeral on the outside wall of their school.[143] A lower court had ruled that the penalty was overly severe because the school rule under which they were suspended did not further a substantial legitimate interest of the school. The rule in question mandated the lengthy suspension for any vandalism. As a general rule, courts have upheld

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139. Pollnow v. Glennon, 594 F Supp. 220 (S.D.N.Y. 1984)
140. Pollnow v. Glennon, 757 F.2d 496 (2d Cir. 1985)
141. *Id.* at 501.
142. Clements v. Board of Educ. of Decatur, 478 N.E.2d 1209 (Ill. App. Ct. 1985).
143. Clinton School Dist. v. Byrd, 477 So. 2d 237 (Miss. 1985).

mandatory expulsion rules for drug possession and other serious violations, but have sometimes refused to approve severe penalties for less serious matters.[144] In this instance, the Mississippi court concluded that a mandatory rule did not actually prevent the district from using a less severe punishment. The court then concluded that the penalty was not so excessive as to require judicial intervention, even though the court suggested it might have been more appropriate to have the students memorize Shakespeare, "earthly power doth . . . show likest God's when mercy seasons justice," and recite the lines to the school board.

Lower courts sometimes hear cases involving procedural confusion in expulsion cases. A school board in Pennsylvania expelled a student for stealing money from two teachers and, when the first expulsion hearing was challenged as defective, held a second hearing which also resulted in expulsion. The parents, in the meantime, administratively appealed the expulsion made at the first hearing. A lower court issued a permanent injunction ordering the student reinstated, also as result of the first hearing.

A Pennsylvania appeals court heard the district's appeal of the lower court injunction. The court concluded that the injunction could not be issued without a hearing before the court and that the district could not hold a second expulsion hearing while the parents were appealing the first one administratively.[145] The appeals court finally ordered the parties to start over with a new hearing before the school board. In a case with similar procedural complexity, an Alabama appeals court ordered a judicial rehearing in an expulsion case when a lower court refused to allow the parties to argue the question of whether a new court hearing should be held.[146]

Three 1985 cases involved the appropriate penalty for a student selling caffeine pills while representing them as "speed." A Florida court heard two of these, holding in the first that a student who represented the pills as a controlled substance could be expelled for the sales.[147] The expulsion penalty was overturned in a second case wherein the same court held that the student never represented the pills as anything but caffeine.[148] A Pennsylvania court found a third way of dealing with the issue, remanding its case to determine

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144. *See* Mitchell v. Board of Trustees of Oxford, 625 F.2d 660 (5th Cir. 1980).
145. Norristown Area School Dist. v. A.V., 495 F.2d 990 (Pa. Commw. Ct. 1985).
146. Adams v. Dothan Bd. of Educ., 475 So. 2d 580 (Ala. Civ. App. 1985).
147. Jones v. Brevard County School Bd., 460 So. 2d 760 (Fla. Dist. Ct. App. 1985).
148. McEntire v. Brevard County School Bd., 471 So. 2d 1287 (Fla. Dist. Ct. App. 1985).

whether the board's suspension was actually based on a decision to treat a caffeine pill sale as if it were speed.[149] The board's written decision was so brief that it was not possible for the court to determine how the board had viewed the offense.

Corporal Punishment

State courts of appeal heard two cases in 1985 involving allegations of excessive corporal punishment. Laws in some states, mostly in the southern part of the country, permit the corporal punishment of students for rule infractions under guidelines enunciated in the statutes. Lawsuits result when parents claim that the penalty resulted in physical or emotional damage. In the first of these cases, a North Carolina court heard a claim that a paddled student suffered from "post-traumatic stress syndrome."[150]

The student had asked to receive the paddling in lieu of serving three days of in-school suspension. A lawsuit followed, however, and a lower court refused to award damages. A variety of claims were raised on appeal, including the lower court's rulings on the relevance of testimony offered by the plaintiffs' witnesses. In addition, the plaintiffs charged that corporal punishment should be banned in North Carolina because the United States had ratified the United Nations Charter which banned the penalty. The appeals court rejected all the challenges, holding that the penalty had been inflicted without malice and in the furtherance of a valid educational goal.

A Georgia appeals court heard a claim that a student who had disrupted his class by displaying an obscene drawing was injured by paddling that was excessive.[151] As in the previous case, the student selected the paddling as an alternative to suspension. While his parents claimed the paddling had resulted in severe bruises, testimony in the case suggested he had returned to class without exhibiting signs of pain. The Georgia court concluded that the punishment was warranted and was not administered with malice.

Testing and Placement

Placement cases focus on the discriminatory impact of placement

149. Big Spring School Dist. v. Hoffman, 489 A.2d 998 (Pa. Commw. Ct. 1985).
150. Gaspersohn v. Harnett County Bd. of Educ., 330 S.E.2d 489 (N.C. Ct. App. 1985).
151. Maddox v. Boutwell, 336 S.E.2d 599 (Ga. Ct. App. 1985).

tests on protected groups and generally are filed either by parents who believe that their child was misplaced, or by groups arguing that the tests are being used to segregate schools along racial lines. In a significant case with racial overtones, the Georgia NAACP filed suit alleging that minority students were being assigned to classes for the educable mentally retarded (EMR) on the basis of race. The suit claimed violations of the fourteenth amendment, title VI of the Civil Rights Act of 1964, the Equal Educational Opportunities Act, section 504 of the Rehabilitation Act of 1973, and other state and federal rights. A district court held that the defendants had violated section 504 with their policies on the evaluation and placement of students in EMR programs. Both parties appealed.

The Eleventh Circuit, after concluding that minority students were disproportionately represented in the programs in question, turned to the question of racial discrimination. While the district court had required proof that the schools had intentionally discriminated against the students, the NAACP argued that the past segregative practices of the school systems required that intent be assumed,[152] basing its argument on *Keyes v. School District No. 1*.[153] While the plaintiffs argued that the Georgia schools had never become unitary, the defendants cited a case that suggested ability grouping could be used "if the school district can demonstrate that its assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities."[154] They claimed that the programs provided such opportunities and therefore should be allowed to continue. The Eleventh Circuit concluded that the lower court's acceptance of the opportunity argument was not clearly erroneous and let it stand.

Turning to the title VI claim, the Eleventh Circuit found that the Supreme Court had held that title VI suits could be filed based on a disparate impact theory.[155] Intent, then, did not have to be proved. The Eleventh Circuit court, however, found that the school districts had rebutted the *prima facie* case of discrimination by establishing the educational necessity for the ability grouping. The court also found that the plaintiffs "had failed to show the existence of equally sound educational alternatives to the assignment plans that result in less racial disproportionality."[156] In addition, the practices affected white and black students equally.

152. Georgia NAACP v. Georgia, 775 F.2d 1402 (11th Cir. 1985).
153. 413 U.S. 189 (1973).
154. McNeal v. Tate County School Dist., 508 F.2d 1017, 1020 (5th Cir. 1975).
155. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983).
156. 775 F.2d 1403, 1417 (11th Cir. 1985).

Turning to the section 504 arguments, the Eleventh Circuit held that *Smith v. Robinson*[157] did not preclude the filing of claims for the procedural violations found in this case. The defendants had argued that, because the claims could have been filed under the Education for all Handicapped Children Act of 1975 (EHCA), section 504 could not be used. The Eleventh Circuit concluded, however, that *Smith v. Robinson* was not intended to bar section 504 claims, even when EHCA provides equivalent substantive rights. Because the section 504 violations were "largely conceded by the defendants," the Eleventh Circuit remanded the case for a hearing on relief, but ordered such relief not to exceed that available under EHCA. This case, then, suggests that courts may also limit recovery of damages sought for school violations of section 504, even if EHCA claims are totally absent in the case.

A Missouri district court considered a challenge to the placement of a third-grade student in a predominately black math class.[158] The class, which lasted for forty-five minutes each day, consisted of fourteen black students and three white students. While the parents argued racial motivation in the placement decision, the court found that numerical scores in math class could not be considered subjective criteria and dismissed the parents' complaint, which it characterized as "arising primarily from the hypersensitivity of both parents."[159] Costs were assessed to the plaintiffs, though the court refused the district's request that it issue an order barring the parents from the school grounds.

DESEGREGATION

Desegregation cases have, in recent years, increasingly focused on two major issues. The question of state responsibility for paying the cost of urban desegregation increasingly has been argued, with courts in several states assigning part of the liability for creating segregated systems to state officials, thereby creating the obligation for the states to fund desegregation plans. The second issue involves attempts by school districts to prove they have achieved unitary status, thereby lessening federal court supervision over their plans to construct new schools or otherwise make decisions indirectly affecting the racial composition of the schools. Cases with this focus are grouped in the section below that discusses desegregation plan oversight.

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157. 104 S. Ct. 3457 (1984).
158. Bond v. Keck, 616 F. Supp. 581 (E.D. Mo. 1985).
159. *Id.* at 383.

Systemwide Remedies

The Humnoke, Arkansas school district consists of two separate communities, one black and one white. In a case presenting facts more closely linked to desegregation complaints of two decades ago, parents of black children filed suit alleging that the school system was segregated and that an at-large school board election system was a major factor in perpetuating segregation.[160] Evidence in the case included data showing that only two black teachers were retained when an all-black school was closed in 1968, that racial slurs were commonly used by staff, and that blacks were denied use of school facilities made available to white students. The only "glimmer of hope" the district court could find was that all activities over which the student body had control were fully integrated.

The court ordered the district to establish a biracial committee to develop "objective nondiscriminatory standards" for the hiring and promotion of teachers. The committee was given four months to submit its plan. The system also was required to revise its student disciplinary procedures to end its disproportionate impact on minority students. Finally, the court scheduled a hearing to give the parties an opportunity to present alternatives to the district's at-large school board election system, finding that the process had been maintained to deny blacks representation on the district's board. Defendants in the case prevailed only on an issue involving claims that school personnel were guilty of assaulting students, with the court refusing to find that corporal punishment or the mental distress suffered by black students rose to that level of seriousness.

Cross-district Remedies

The question of which governmental units should pay for a massive interdistrict remedy to desegregate St. Louis schools was back before the Eighth Circuit. In 1983, the city of St. Louis and surrounding suburban districts reached an agreement on a voluntary student transfer plan. A district court held the state responsible for the cost of the plan and for one-half the cost of program and capital improvements in St. Louis.[161] The state appealed, but the Eighth Circuit affirmed the state's role in creating the school segregation and its con-

160. Shapell v. Humnoke School Dist. No. 5, 619 F. Supp. 670 (E.D. Ark. 1985).
161. Liddell v. Board of Educ., St. Louis, 567 F. Supp. 1037 (E.D. Mo. 1985).

comitant responsibility to fund part of the remedy.[162] In 1985, the board of education again returned to the Eighth Circuit seeking to modify parts of the district court's numerous orders in the case.[163]

At issue in the 1985 appeal was whether the state of Missouri could be required to pay for certain program costs in St. Louis schools that were not being integrated. While finding previous decisions "not entirely clear" on this matter, the Eighth Circuit held that the state must fund half the cost of programs in effect as of February 8, 1984, the date of the court's earlier *en banc* decision that the Supreme Court refused to review. The Eighth Circuit also remanded a variety of issues related to the cost of new construction and other programs. Under the controversial plan, as of early 1985 about 8,000 St. Louis students were enrolled in the plan's magnet schools and around 5,000 city students were bused to suburban schools. Given the likelihood of additional disputes over funding responsibilities, more litigation in this case is probable.

A systemwide remedy for school segregation in Dayton, Ohio, was upheld by the Supreme Court in 1979.[164] The issue of state liability in the case was reviewed in 1982 and was the subject of a district court decision in 1985.[165] The first issue addressed by the court was whether the state board and department of education could be sued for federal law violations. On this, the district court answered affirmatively, relying on *Alabama v. Pugh*.[166] The court went on to conclude, however, that the education board and department shared the state's eleventh amendment immunity from damage recovery.

The suit against the governor and other state officials, however, sought prospective injunctive relief for violations of federal law and was filed against these individuals in their official capacities. Even though such an injunction might require the expenditure of funds, the court concluded that this fell within the exception to eleventh amendment defenses permitted by *Ex parte Young*[167] as elaborated in an important Sixth Circuit case.[168] The prospective compliance exception permits suits for injunctive relief for federal violations.

The district court then detailed the ways in which the state had

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162. Liddell v. Missouri, 731 F.2d 1294 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 82 (1984). Litigation also continued to argue the federal contribution for Chicago desegregation. *See* United States v. Board of Educ., City of Chicago, 621 F. Supp. 1296 (N.D. Ill. 1985).

163. Liddell v. Board of Educ., St. Louis, 758 F.2d 290 (8th Cir. 1985).

164. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

165. Brinkman v. Gilligan, 610 F. Supp. 1288 (S.D. Ohio 1985).

166. 438 U.S. 781 (1978).

167. 209 U.S. 123 (1908).

168. Banas v. Dempsey, 742 F.2d 277 (6th Cir. 1984).

acted or had failed to act, thereby increasing school segregation in Dayton. The court concluded, among other things, that the state had not adequately investigated segregation in Dayton and had not used its powers to withhold state funding to force integration. As a result, the state was ordered to pay half of all expenses incurred in the case to date, as well as future costs as they are incurred.

The state of Tennessee had avoided responsibility for funding metro Nashville desegregation costs until a district court, using reasoning similar to the Dayton case just discussed, ordered the state to assume 60% of the costs.[169] Concluding that the eleventh amendment precluded retroactive awards, the order was made effective from the point the state defendants were entered as defendants in 1981. The Tennessee officials were found to have impeded desegregation through maintaining segregationist statutes, passing antibusing resolutions and threatening to cut off state funds to any district using voluntary busing.

Following the Supreme Court's guidelines in *Milliken v. Bradley*,[170] an Arkansas district court found that Little Rock and two adjacent suburban districts had, over the years, adjusted boundaries and had otherwise caused substantial interdistrict segregation.[171] The official actions had resulted in two districts that consisted of largely white student populations and one that was largely black. The court subsequently ordered the consolidation of the three districts and held the state defendants liable for financial and oversight responsibilities, to be decided at a later date.[172] The state and local defendants appealed.

The Eighth Circuit Court of Appeals, *en banc*, approved most of the district court decision.[173] The appeals court affirmed the finding of interdistrict violations by the state and defending school districts. As to the remedy, however, the court set aside the lower court's consolidation order, holding that the remedy exceeded the scope of the violations. Instead, the Eighth Circuit ordered the district court to hold a hearing and to make "limited adjustments" to the school district boundaries as a way of furthering integration. County wide magnet schools and compensatory programs were also ordered.

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169. Kelley v. Metropolitan County Bd. of Educ., 615 F. Supp. 1139 (M.D. Tenn. 1985).

170. 418 U.S. 717 (1984).

171. Little Rock School Dist. v. Pulaski County Special School Dist., 584 F. Supp. 328 (E.D. Ark. 1984). *See* The Yearbook of School Law 1985 at 124.

172. Little Rock School Dist. v. Pulaski County Special School Dist., 597 F. Supp. 1227 (E.D. Ark. 1984).

173. Little Rock School Dist.v. Pulaski County Special School Dist., 778 F.2d 404 (8th Cir. 1985).

Desegregation Plan Oversight

The Supreme Court has never precisely articulated a definition of when a school district is "unitary" or set precise standards on when or in what ways school desegregation cases should be closed. *Green v. County School Board of New Kent County*,[174] however, suggests it is appropriate for courts to look to a variety of factors, including faculty, staff, composition of the student body, transportation, extracurricular activities, and facilities, in order to decide if a district can be removed from court supervision. While cases can be reopened upon a showing of segregative or resegregative intent on the part of school officials, removal of court supervision increases the burden of proof required of those claiming constitutional violations and also increases the latitude for making decisions on the part of school officials. Litigation expenses are clearly reduced as well. For these reasons, then, systems seek rulings freeing themselves from judicial supervision.

Litigation involving desegregation in Boston continued in 1985, with the district finally obtaining a final order in the protracted dispute. Before the final case, a number of interim orders were issued. New student assignment plans were approved in the first of the decisions.[175] In the second, the court approved a minority administrator hiring plan that protected such administrators from layoffs, should the administrative force be reduced.[176] The court's general orders regarding facilities, student assignments, staff levels, and parent councils also were stressed and a "modification procedure" that the district would use in changing previous orders was elaborated. Conditional approval of a plan for renovating school facilities also was given, with the specific buildings and a timetable set forth.[177] Finally, the court concluded that the defendants' compliance with "some aspects of the student desegregation plan issued years ago warrants the entry of final orders in this case."[178] In this decision, the court also gave the parties additional time to appeal the orders contained in earlier 1985 cases. These appeals should ensure at least one more year of reporting Boston litigation in this chapter.

De Kalb County, Georgia, school officials decided to address overcrowding in a predominantly white high school by building a new middle school to serve the same attendance area, rather than altering

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174. 391 U.S. 430 (1968).
175. Morgan v. Nucci, 602 F. Supp. 860 (D. Mass. 1985).
176. Morgan v. Nucci, 612 F. Supp. 1060 (D. Mass. 1985).
177. Morgan v. Nucci, 617 F. Supp. 1316 (D. Mass. 1985).
178. Morgan v. Nucci, 620 F. Supp. 214, 217 (D. Mass. 1985).

the attendance zones to utilize undercapacity high schools that were predominantly black. This plan was approved by a district court, in an unpublished decision, with the court also concluding in passing that the district had achieved unitary status. Black parents appealed this decision and the Eleventh Circuit reversed.[179] The appeals court observed that the lower court had used the wrong standard of proof in requiring the plaintiffs to prove discriminatory intent, the standard that would apply after the unitary status had been granted. Such status can be conferred only after a full hearing, which was absent in this case. Furthermore, the Eleventh Circuit cited a number of Supreme Court holdings[180] to remind the district court to consider the segregative or resegregative impact of the district's decision. The case was remanded to the lower court for a study of alternatives to the overcrowding. The school district also was warned that if it proceeded with the reconstruction it was doing so at its own risk.

Denver's school board sought an order declaring that its district was unitary, but, after using the *Green* criteria, the district court concluded the district was not ready to be free from court supervision.[181] In its lengthy opinion, the court found there was no challenge to the way the district handled its facilities or extracurricular activities for students. Pupil assignments also reflected a desegregated system. Faculty assignments, on the other hand, involved the use of "hardship transfers" that were inadequately monitored and may have been made on racial grounds. In addition, the system had no plan for preventing resegregation through "benign neglect." The court also was concerned that the district might follow a recent Colorado law prohibiting "forced busing." While rejecting the district's motion, the court invited the parties to a meeting to further a settlement in the case.

A controversial monitoring commission had been highly critical of the Detroit board's performance on issues related to a court-ordered student code of conduct. Holding that the commission "intrudes on normal processes" of educational decision making, a district court terminated the commission as of the end of 1984.[182] This order was appealed, with plaintiffs arguing that the lower court lacked the power to dissolve the commission because its creation was part of a 1981

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179. Pitts v. Freeman, 755 F 2d 1423 (11th Cir. 1985).

180. Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1970); Wright v. Council of City of Emporia, 407 U.S. 451 (1972) (reestablishing a dual school system violates system's obligation to desegregate).

181. Keyes v. School Dist. No. 1, 609 F. Supp. 1491 (D. Colo. 1985).

182. Bradley v. Milliken, 585 F. Supp. 348 (E.D. Mich. 1984). *See* The Yearbook of School Law 1985 at 128.

consent decree in the long-standing Detroit litigation. On appeal, the Sixth Circuit refused to rule on the merits of the plaintiffs' argument, holding instead that the lower court was obligated to hold a hearing before modifying a consent decree.[183] Because its decision was not made at the request of either party, the court did not give appropriate notice. The case therefore was remanded, with the Sixth Circuit refusing to address the question of whether the lower court had the authority to dissolve the commission.

A federal court monitoring desegregation in Dallas permitted the creation of one-race remedial centers for 2,300 elementary school students.[184] The students had been bused to schools with some white students, though these schools were becoming predominantly minority due to a general decline of Anglo students in the Dallas system. While not objecting to the plan when the district court held a hearing on it, one of the parties in the Dallas desegregation case subsequently filed an appeal.[185] The appeal was rejected by the Fifth Circuit, which found that the one-race centers, while having a slight resegregative effect, would result in quantifiable reading test achievement gains that could easily be monitored by the district court.

Court supervision of desegregation in Buffalo focused on finances in 1985, with the district court accepting a magistrate's report concerning the district's spending in the last two school years.[186] Buffalo is a "dependent" school district, having no independent power to levy taxes, relying instead on funds appropriated by the city. The city, in turn, while setting the district's spending limit, had no control over how funds were expended. Both the district and the city were found to have intentionally maintained a segregated school system.[187] The question of how much of the district budget was related to desegregation and therefore was under court supervision, however, remained in dispute. The court-appointed magistrate ultimately secured the approval of the budget levels for 1983-84 and 1984-85 from both the board and city council, but the mayor refused to accept the settlement. Nevertheless, the district court approved the agreement, holding that the board had adequately demonstrated the expenses necessary for desegregation. At the same time, however, the court accepted the magistrate's recommendations regarding the need for the board to im-

183. Bradley v. Milliken, 772 F.2d 266 (6th Cir. 1985).

184. Tasby v. Wright, 585 F. Supp. 453 (N.D. Tex. 1984). *See* The Yearbook of School Law 1985 at 128.

185. Tasby v. Black Coalition to Maximize Educ., 771 F.2d 849 (5th Cir. 1985).

186. Arthur v. Nyquist, 618 F. Supp. 804 (W.D.N.Y. 1985).

187. Arthur v. Nyquist, 415 F. Supp. 904 (W.D.N.Y. 1976), *aff'd in relevant part*, 573 F.2d 134 (2d Cir.), *cert. denied sub nom.*, March v. Arthur, 439 U.S. 860 (1978).

prove its out-of-date accounting procedures.

Alternative desegregation plans were proposed for Hattiesburg, Mississippi, with plaintiff-intervenors attacking the government's plan involving the use of magnet schools.[188] They favored an alternative that involved mandatory reassignment pairing and clustering. While the alternative plan would lead to the most immediate integration, the court was persuaded by a government expert witness that the more integrative plan would lead to white flight, thereby defeating its initial gain. The court also was persuaded that administrative tangles and increased transportation costs would result from the pairing plan. The consent decree using the magnet schools therefore was approved.

Plaintiff-intervenors also sought unsuccessfully to halt the construction of a new school in Lawrence County, Mississippi.[189] The district court concluded that the plaintiff-intervenors had failed to demonstrate any adverse impact on black students by the board's decision to reconstruct a school first built in 1928. Hopes that county schools might be consolidated were insufficient grounds for the court to issue an injunction halting the construction. In another case, the rezoning of school districts in a Louisiana parish was contested by third parties who sought court approval to intervene. The district court refused on the ground that the interests of the new parties already were represented.[190]

Plaintiffs seeking to prevent the closing of a middle school in South Carolina were unsuccessful in obtaining an injunction to halt its construction.[191] They proceeded, however, with arguments on the merits, stressing the historical importance of the middle school to be closed to the black community. While the district court conceded that the historical significance argument might permit a finding of disproportionate impact, the court found that, overall, the closing had equal impact on both black and white students.[192] The closing did reduce the number of black teachers in the system by half, but the court employed a discriminatory intent analysis and refused to halt the closing based on the decline. The district was not under previous court supervision regarding desegregation.

In two 1985 cases, district courts found that school districts had achieved unitary status and that changes in student assignment

188. United States v. Mississippi, 622 F. Supp. 622 (S.D. Miss. 1985).
189. United States v. Lawrence County School Dist., 606 F. Supp. 820 (S.D. Miss. 1984).
190. Trahan v. LaFayette Parish School Bd., 616 F. Supp. 220 (W.D. La. 1985).
191. Wharton v. Abbeville School Dist. No. 60, 725 F.2d 678 (4th Cir. 1983).
192. Wharton v. Abbeville School Dist. No. 60, 608 F. Supp. 70 (D.S.C. 1984).

plans did not warrant judicial intervention. In the first, plans to curtail busing of elementary children in grades one through four in Oklahoma City were challenged because they would create racially identified schools.[193] The district court had terminated supervision over the schools in Oklahoma City in 1977. Finding that the changes in racial composition would be "an unintended and largely unavoidable consequence of other objectives sought for the benefit of all students,"[194] the court held that intervention would be appropriate only had there been a showing of intent to resegregate.

A South Carolina district court held that the Greenville County schools had been unitary since 1976 and, following the *Green* criteria, that this pattern had continued to the present time.[195] The court therefore refused to intervene in school board decisions to close some schools and to convert others. The concerns of the plaintiffs, it concluded, were more properly to be heard in the "administrative or political forum."

In 1983, a Maryland district court reopened its supervision of desegregation in Prince George's County after finding that the district had not achieved unitary status and that proposed busing changes would have a negative effect on racial balance in the schools.[196] Both parties appealed, with the plaintiffs attacking the district court's failure to accept their argument that special education and gifted program assignments were causally related to previous segregation. The school board attacked the lower court's ruling in reopening the case. The plaintiffs won on all grounds, with the Fourth Circuit holding that the lower court was correct, adding that the burden was on the school system to prove that the placements were not discriminatory.[197]

Attorney Fees

Attorney fees are sought by "prevailing parties" under section 1988 of the 1976 Civil Rights Attorney's Fees Act[198] for the constitutional violations found in school desegregation cases. Decisions in fee cases sometimes seem like complicated balancing acts, with courts

193. Dowell v. Board of Educ. of Okla. City, 606 F. Supp. 1548 (W.D. Okla. 1985).
194. *Id.* at 1554.
195. Whittenberg v. School Dist. of Greenville County, 607 F. Supp. 289 (D.S.C. 1985).
196. Vaughns v. Board of Educ. of Prince George's County, 574 F. Supp. 1280 (D. Md. 1983).
197. Vaughns v. Board of Educ. of Prince George's County, 758 F.2d 983 (4th Cir. 1985).
198. 42 U.S.C. § 1983, 1988.

adding to the fees for cases presenting complicated and uncertain issues, deducting for duplicative efforts, and puzzling over appropriate hourly rates. A Fifth Circuit case listing twelve factors to consider in determining an appropriate award of attorney's fees is frequently cited,[199] as is *Hensley v. Eckerhart*,[200] wherein the Supreme Court admonished lower courts to beware of "overstaffing," poor record keeping, and "duplicative" charges.

At issue in two federal courts of appeal cases in 1985 was the question of when the meter began running for lawyers involved in the case. Litigation commenced in 1955 seeking to secure desegregation of Nashville's schools and continues to the present. In 1983, a district court awarded $139,500, or less than 10% of the amount requested, to lawyers involved in the case.[201] In making this calculation, the district court concluded that a 1971 decision by the Sixth Circuit[202] represented a "final order" in the case. The lower court therefore declined to consider pre-1971 claims. After first hearing the case, the Sixth Circuit decided to hear the appeal *en banc*. The Sixth Circuit then reversed the district court, holding that its 1971 decision did not represent a termination of litigation.[203] On remand, the lower court was instructed to return to the 1955 date for a determination of fees.

The 1983 district court decision involving the Nashville case also concluded that the court was precluded from awarding fees for appellate litigation under a 1982 Sixth Circuit decision that attorney fees under section 1988 for appellate work had to be awarded by the appellate court.[204] The Sixth Circuit decided it was wrong in 1982 and overruled its own decision, now deciding that a trial court was in a better position to decide who had prevailed at the appellate level. Given this change of heart, the lower court also was told to recalculate the fees based on the numerous case appeals. The lower court's reduction of the fees by 10% was approved as compensation for attorney inexperience. Finally, on remand, the district court was instructed to make sure, following *Hensley*, that fee claims are scrutinized as to the success of the issue argued.

The question of when to start recording fees also was at issue in an Eleventh Circuit case. A Georgia district court, looking at the

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199. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).
200. 461 U.S. 424 (1983).
201. Kelley v. Metropolitan County Bd. of Educ., 558 F. Supp. 468 (M.D. Tenn. 1983).
202. Kelley v. Metropolitan County Bd. of Educ., 463 F.2d 732 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972).
203. Kelley v. Metropolitan County Bd. of Educ., 773 F.2d 677 (6th Cir. 1985).
204. Buian v. Baughard, 687 F.2d 859 (6th Cir. 1982).

twenty-three year old Dougherty County case, concluded that a 1972 Fifth Circuit decision that awarded no fees had implicitly affirmed the district court's earlier denial of such awards. The district court therefore permitted fees from 1978 when the plaintiffs filed a plan for the creation of a unitary district.[205] On appeal, the Eleventh Circuit held that its earlier decision did not implicitly deny fees.[206] Instead, the appeals court suggested that the decisions should be read as vacating the lower court's fee rulings until an acceptable desegregation plan was developed. The Eleventh Circuit also observed that section 1988 could be applied retroactively to all cases in progress when it was enacted. The case was remanded to the district court for further elaboration on its system for computing hourly rates and for a calculation of pre-1971 fees.

An award made in 1984 contained a factor of 7.5% "risk enhancement" for undertaking "novel claims" in the case involving the reopening of court supervision of desegregation in Prince George's County.[207] The board of education appealed, arguing that the risk enhancement was an abuse of discretion by the lower court. The Fourth Circuit disagreed, holding that while a contingency fee should be reserved for a case producing exceptional success, the lower court's overall treatment of the fee request, including a 37% reduction in billable hours, showed that it had responsibly considered the fee question.[208]

205. Gaines v. Dougherty County Bd. of Educ., 586 F. Supp. 1324 (M.D. Ga. 1984). *See* The Yearbook of School Law 1985 at 131.

206. Gaines v. Dougherty County Bd. of Educ., 775 F.2d 1565 (11th Cir. 1985).

207. Vaughns v. Board of Educ. of Prince George's County, 598 F. Supp. 1262 (D. Md. 1984). *See* The Yearbook of School Law 1985 at 130-31.

208. Vaughns v. Board of Educ. of Prince George's County, 770 F.2d 1244 (4th Cir. 1985).